

Who Gets the Takings Claim?

Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers

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Anton buys unregulated beachfront property in 1970. In 1977, the state passes its first wetlands protection act, which severely limits Anton's ability to use his undeveloped property. Anton sells the land to Joseph in 1989, and Joseph's application for a building permit is denied. Joseph then sues the state in state court, arguing that his property has been taken by regulation.

State courts have shown little sympathy for Joseph. He bought the property with full knowledge of the recent restrictions, and he should have received a price discount that factored in the risks of buying regulated property.

What about Anton? He could not bring a takings claim himself, because he never had any plans to use the property, never had any permit applications denied, and thus never ripened a regulatory takings claim. But Anton suffered a loss when he attempted to sell the property and discovered that buyers were reducing their offers to reflect the state's recently enacted restrictions on the use of the land.

This Article argues for the recognition of a new type of regulatory takings claim. Anton ripens this claim by selling his property at a reduced price rather than by applying unsuccessfully for permission to build. He prevails only if he can demonstrate that the harm he suffered when he sold the property rises to the level of a taking.

The approach that this Article recommends does not change substantive takings law and should neither increase nor decrease the overall liability that governments face. However, it affords fair treatment to owners who elect to sell their land after a change in the law instead of attempting to develop it themselves.

I. INTRODUCTION: GAZZA'S STRIP

The takings battle returns to the beach, this time to Dune Road in the Village of Quogue, Town of Southampton, Long Island. Joseph Gazza, a local attorney and real estate developer, owns a large lot—about one acre¹—that backs on

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¹ The New York Court of Appeals stated that the parcel contained 43,500 square feet. See

Quogue Canal; the houses across Dune Road from Gazza's lot back on the Atlantic Ocean.

Gazza's lot became subject to state wetlands regulation in 1977, twelve years before he acquired it. After 1981 amendments to the wetlands designation, about 65% of the lot was inventoried as tidal wetlands.² Shortly before he bought the lot in 1989,³ Gazza submitted an application to the New York State Department of Environmental Conservation (DEC) seeking two variances to construct a single-family home that would be located within the tidal wetlands boundary.⁴

While his application was pending, Gazza purchased the lot for \$100,000, on November 29, 1989.⁵ In 1990 and several subsequent years, Gazza successfully petitioned the Village of Quogue and the Town of Southampton for reductions in his real estate taxes, because "his property 'had wetlands on it and that should be taken into consideration in the taxing of this property.'"⁶

Gazza v. New York State Dep't of Envtl. Conservation, 679 N.E.2d 1035, 1036 (N.Y. 1997). The Appellate Division referred to "the in-excess-of-47,000-square-foot parcel." *Gazza v. New York State Dep't of Envtl. Conservation*, 634 N.Y.S.2d 740, 740 (N.Y. App. Div. 1995). An acre contains 43,560 square feet.

² New York's Tidal Wetlands Act became effective in 1973. *See Gazza*, 679 N.E.2d at 1038. Much of the subject parcel first was inventoried as wetlands in or about 1977, and this wetlands designation was amended in 1981. *See Gazza*, 634 N.Y.S.2d at 740. Gazza purchased the lot in 1989. *See id.*

Dune Road is notoriously unstable. *See, e.g., John McDonald, The East End: Not Just Another Storm on Dune Rd.*, *NEWSDAY*, Dec. 20, 1992, at 2 (noting that "[a]t times, when the rest of Long Island is hit by a storm that does little other than flood basements and stall traffic, Dune Road can be counted on to lose a few houses"). The fact that the number of homes in the erosion danger zone has dropped from nearly 300 to fewer than 100 is not a testament to the success of storm control projects. *See id.*

³ Neither of the opinions states whether Gazza filed his application before or after contracting to purchase the property, nor do they indicate the extent of any financial losses he might have suffered had he refused to close. Thus, it is not clear how the seller and Gazza had apportioned the risks of pre-closing uncertainty as to his ability to obtain a building permit. The fact that Gazza closed without receiving the necessary permits suggests that he planned to bear this risk from the outset. However, the purchase price indicates that he was compensated for this risk. *See infra* note 145 and accompanying text (discussing identity of seller); *see also infra* note 150 (discussing relevance of purchase price).

⁴ State regulations required a 75-foot setback from the tidal wetland boundary for dwellings and a 100-foot setback for septic systems. *See Gazza*, 634 N.Y.S.2d at 741. Gazza stated that "he was assured by DEC officials that he could win an exemption to build within 28 feet of the wetlands." H. Jane Lehman, *This Land is Whose Land: Property Rights Activists Are Raising Their Voices All the Way to the Supreme Court*, *NEWSDAY*, Mar. 7, 1992, at 34.

⁵ *See Gazza*, 634 N.Y.S.2d at 740. Most of the purchase price—\$90,000—was used to discharge a federal tax lien previously imposed on the property. *See id.*

⁶ *Id.* at 742.

DEC denied Gazza's application on January 16, 1992, and Gazza commenced a proceeding in state supreme court about a month later, arguing that the state's denial of the building permit constituted an uncompensated taking of his property.⁷ Each party introduced appraisal evidence, with Gazza's appraiser valuing the land at \$396,000 and DEC's appraiser stating that the land was worth approximately \$80,000.⁸ The difference seems to have been based entirely on the different instructions given to the two appraisers: Gazza told his expert to assume that a residence could be constructed on the lot while DEC instructed its appraiser to assume that the property was not readily buildable and most likely could be used only for recreational purposes.⁹

The New York Court of Appeals unanimously held in favor of DEC, with five of the six participating judges agreeing that, "Petitioner cannot base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title . . ."¹⁰ In three other takings cases decided the same day, the court reached similar results.¹¹ Nearly every other state to face this issue has come to the same conclusion.¹²

⁷ See *id.* at 741.

⁸ See *id.* A local resident testified that he offered Gazza \$50,000 for the property in 1991 and never withdrew his offer. See *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1037 (N.Y. 1997).

⁹ See *Gazza*, 634 N.Y.S.2d at 741; see also *Berwick v. State of New York*, 486 N.Y.S.2d 260, 262-63 (N.Y. App. Div. 1985) (per curiam) (discussing similar disparities in appraisal instructions); *Chase Manhattan Bank v. State of New York*, 479 N.Y.S.2d 983, 985 (N.Y. App. Div. 1984) (per curiam) (same).

¹⁰ *Gazza*, 679 N.E.2d at 1040. The court held in the alternative that there was no taking because the state did not deprive the property of all of its economically viable use. See *id.* at 1043. Five of the seven judges agreed on the reasoning summarized in the quoted passage. Judge Wesley concurred in the result but agreed only with the alternative holding. See *id.* at 1043-44 (Wesley, J., concurring). Judge Titone did not take part in the decision. See *id.* at 1044.

¹¹ See *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870 (N.Y. 1997); *Basile v. Town of Southampton*, 678 N.E.2d 489 (N.Y. 1997) (mem.). All four landowners petitioned for certiorari; Anello withdrew her petition after settling her case, and the Supreme Court denied the three other petitions. See M. Robert Goldstein & Michael J. Goldstein, *Full and Perfect Compensation*, N.Y.L.J., Oct. 22, 1997, at 3.

¹² See, e.g., *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1030-31 (Ind. 1998) (finding no taking of prior nonconforming use when post-enactment buyers were on constructive notice of change in law at time they acquired property); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994) (finding no taking when property owners were unable to use part of their land after discovering Native American burial mound on it; state law that predated plaintiffs' acquisition of title prohibited disinterment of burial mounds and required buffer

zones around them for their protection); *Leonard v. Town of Brimfield*, 666 N.E.2d 1300, 1303–04 (Mass. 1996) (denying takings compensation to owner who was unable to use about ten of her sixteen acres because she bought property subject to existing restrictions on building in flood plain); *Myron v. City of Plymouth*, 562 N.W.2d 21, 23–24 (Minn. Ct. App. 1997) (holding that post-enactment buyer cannot later bring takings claim and noting that buyer's gamble presumably was reflected in purchase price); *Claridge v. New Hampshire Wetlands Bd.*, 485 A.2d 287, 291 (N.H. 1984) (observing that “[a] person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights”); *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (Or. 1993) (finding no taking because plaintiffs were on notice at time they acquired property that they did not have exclusive use of dry sand areas of beach); *Alegria v. Keeney*, 687 A.2d 1249, 1253–54 (R.I. 1997) (holding that owner's knowledge of wetlands restrictions at time of his purchase is relevant in determining whether he reasonably could expect to develop property as though wetlands were not present); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (finding no taking after state agency denied fill permit to property owner because owner acquired property after state had designated it as critical area tidelands); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 936 (Tex. 1998) (holding that owner's reasonable investment-backed expectations should have factored in zoning restrictions in effect at time owner acquired property), *cert. denied*, 119 S. Ct. 2018 (1999); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va. 1998) (finding no taking when property owners acquired title after city's dune protection ordinance became effective, even though ordinance may have rendered property economically valueless); *see also Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (reaching similar result under Oregon and federal law).

Cf. McNulty v. Town of Indialantic, 727 F. Supp. 604, 612 (M.D. Fla. 1989) (noting that “[b]y purchasing property with regulatory impediments and waiting to develop it, he took the risk that regulation would become more harsh in the face of increasing concern over dune ecology”); *Gil v. Inland Wetlands & Watercourses Agency*, 593 A.2d 1368, 1373–75 (Conn. 1991) (suggesting in dicta that post-enactment buyer's expectations at time of purchase are relevant to takings claim but finding rule inapplicable to case and remanding); *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1263 (Haw. 1995) (recognizing priority of certain “[t]raditional and customary rights” in property even if they are “deemed inconsistent with generally understood elements of the western doctrine of ‘property’”); *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995) (finding that post-enactment buyer's knowledge of prior zoning restrictions is one factor in determining whether zoning variance should be granted); *Karam v. New Jersey*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998) (noting that “the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development” while simultaneously holding that pre-enactment owners and post-enactment buyers both were on notice of permitting requirement for dock construction and that post-enactment buyers therefore could not assume that they would be immune from all expansions in this law over time), *aff'd*, 723 A.2d 943 (N.J.) (per curiam), *cert. denied*, 120 S. Ct. 51 (1999); *Hoover v. Pierce County*, 903 P.2d 464, 468–69 (Wash. Ct. App. 1995) (holding that subsequent purchasers may not recover for physical taking that occurred prior to their ownership).

The Michigan Court of Appeals has reached a contrary result. *See Guy v. Brandon*

Should Gazza, who purchased the property after the restrictive law took effect, have a right to bring a takings claim against the state? Or should his knowledge of the existing law negate his claim? If Gazza does not have a takings claim, what about the person who sold the land to him? If Gazza knowingly purchased restricted land without any hope of bringing a takings claim, he would have paid a reduced price that reflects that restriction. Does the pre-enactment owner have a claim against the state for this drop in the sale price of the property? If so, when does this claim ripen? If not, will regulators overregulate in the hope that some pre-enactment owners will sell their property and forfeit their claims? The New York court had no reason to consider most of these questions, but by answering the first two it virtually ensured that it will have to address the others.

This Article explores all of these questions, offering a comprehensive analysis of how courts should treat pre-enactment owners and post-enactment buyers when a new land use restriction is adopted or an existing restriction is toughened. Part II discusses four recent cases involving post-enactment buyers who brought takings claims arising from application of land use laws that existed when they acquired their land. This Part also notes the one critically important related issue that the court deciding these cases had no need to reach, namely the status of the pre-enactment owner of newly restricted property.

Part III extends the court's analysis to the pre-enactment owner who becomes subject to a new land use law. This Part begins by distinguishing between physical takings and regulatory takings, between ripe claims and unripe claims, and between facial claims and as-applied claims, as a way of illustrating some of the takings law complexities that arise when land use law changes. The central portion of this Part focuses on the pre-enactment owner who would rather sell her property than test the impact of the new law on her land and suggests an approach for resolving the problems this pre-enactment owner faces. Specifically, this portion of the Article proposes that the pre-enactment owner should retain any takings claim and that the sale of the property should ripen that claim. The post-enactment buyer, in contrast, buys with knowledge of the existing law and has no claim for a taking. The pre-enactment owner's claim will differ from more traditional takings claims and arises from the decreased sale price that she receives rather than from a municipal permit denial.

Township, 450 N.W.2d 279, 285–86 (Mich. Ct. App. 1989) (remanding for calculation of temporary takings compensation). *Guy* relied in part on *Johnson v. Township of Robinson*, 359 N.W.2d 526 (Mich. 1984) and *Kropf v. City of Sterling Heights*, 215 N.W.2d 179 (Mich. 1974), both of which held merely that post-enactment buyers may challenge laws in effect at the time they acquired title. Neither of these Michigan Supreme Court cases reached the question of whether the post-enactment buyer might recover takings compensation. *See also infra* note 92 (discussing whether post-enactment buyers may challenge laws in effect at time they obtained title or seek variances from those laws).

Part III next demonstrates that its proposal is outcome neutral and will not lead to increases or decreases in the overall amount of compensation that courts will have to award. This Part continues by offering a detailed illustration of how a court would have applied this analysis to *Gazza's* predecessor-in-title. Finally, this Part demonstrates why three alternative approaches that courts might employ all are inferior choices and discusses some unusual sets of facts that might merit special treatment.

II. THE FOUR NEW YORK CASES AND THE ISSUES THEY NEVER REACHED

On February 18, 1997, the New York Court of Appeals decided four cases, including *Gazza v. New York State Department of Environmental Conservation*,¹³ with each one focusing on a somewhat different aspect of the same question. Each of the four cases was brought by a person or group of persons who acquired property with actual or constructive knowledge that existing land use restrictions might impair their ability to use their land as they wished. Each landowner later was disappointed when the government enforced the restrictions against the land. Section A provides brief discussions of the three cases other than *Gazza*. Section B demonstrates that the four opinions, while sensible in their results, fail to reach other important questions.

A. *The New York Court and the Status of Post-Enactment Buyers*

In *Kim v. City of New York*,¹⁴ the City placed fill on 2,930 square feet of a larger lot owned by the plaintiffs to raise the property to the grade of the abutting street. Both the common law and the New York City Charter allowed the City to act in this way to support the street and prevent erosion, and a filed map had placed the owners on constructive notice of this fact at the time they bought their property.¹⁵ The owners argued that the City's actions took their property by permanent physical occupation.¹⁶ The New York Court of Appeals disagreed, because the "plaintiffs' title never encompassed the property interest they claim has been taken."¹⁷

The court based its decision in large part on *Lucas v. South Carolina Coastal Council*,¹⁸ in which the United States Supreme Court held that a taking can occur

¹³ 679 N.E.2d 1035 (N.Y. 1997).

¹⁴ 681 N.E.2d 312, 313 (N.Y. 1997).

¹⁵ See *id.*

¹⁶ See *id.* at 314 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)).

¹⁷ *Id.* at 314.

¹⁸ 505 U.S. 1003 (1992).

only if the property interest purportedly taken inheres in the owner's title.¹⁹ If this property interest does not inhere in the owner's title, then the landowner never possessed it and the government cannot have taken it from them. A court determines the rights that inhere in the owner's title by establishing what the state of the common law and statutory law were at the time the owner acquired the property.²⁰ New York State's common law of lateral support and the relevant provisions of the City Charter, both of which allowed the City to act as it did, were settled at the time the plaintiffs acquired the property, and the filed map showed the property as a sunken lot.²¹ The plaintiffs should have been aware of the state of the law at the time they purchased the property and should have factored any encumbrances on their title into the price they paid for the lot.²² "The City's enforcement of this legal obligation therefore does not constitute a taking of any property interest owned by plaintiffs for which they are entitled to compensation."²³ Two judges dissented, arguing that the filling of the plaintiffs' property constituted a permanent physical occupation of their land and that neither the common law nor the City Charter provided advance notice of the encumbrance.²⁴

¹⁹ See *id.* at 1027.

²⁰ See *Kim*, 681 N.E.2d at 315. The court acknowledged that some other courts and commentators have suggested that only common law property and nuisance rules are relevant, but concluded that "we do not think that this aspect of the *Lucas* opinion should be read so narrowly." *Id.* "[I]n identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property." *Id.* at 315–16; see also *infra* notes 76, 87 (discussing this issue).

²¹ See *Kim*, 681 N.E.2d at 318 & n.7 (noting that if land had been at legal grade when plaintiffs purchased property and City then raised grade of street, "a different takings question might be presented"); see also *infra* note 40 (discussing timing of alleged taking in *Kim*). The plaintiffs, however, were on notice of the fact that the street was physically located below the legal grade when they bought their property and that the street might be raised to the legal grade in the future. See *Kim*, 681 N.E.2d at 318 & n.7.

²² See *Kim*, 681 N.E.2d at 319. The court noted that a contrary result might provide the owners with a windfall, allowing them to acquire the property at a discounted price because of the restriction and then to recover takings compensation. "Such a result is inconsistent with the basic purpose of takings law, which is to protect the private landowner from unfair fiscal burdens that should be shared by the public as a whole, not to enrich the landowner at the public's expense." *Id.* (citation omitted).

The court also noted that the plaintiffs were concurrently pursuing a claim against the prior owners of the property, whom they alleged had failed to notify them of the pending grading. "Whatever the merits, this sort of claim is properly asserted against other parties to the transaction, not against the City of New York in the guise of a takings claim." *Id.* at 319 n.9.

²³ *Id.* at 320.

²⁴ See *id.* at 319 (Smith, J., dissenting). Judge Smith was joined by Judge Wesley. See *id.* at 326. Judge Titone did not participate. See *id.* The dissenters believed that the need for fill

In *Basile v. Town of Southampton*,²⁵ the claimant's family acquired twelve acres of tidal property in 1980. Although the land was zoned residential, the property was subject to regulation as wetlands and also was subject to private covenants filed by the former owner that severely limited construction. When the Town condemned the fee in 1990, the parties could not agree upon the value of the property. The Town's appraiser eventually valued the land at \$117,500, an amount factoring in the limitations that the wetlands regulations imposed, while the claimant's appraiser determined that the property was worth \$960,000. The claimant argued that she was entitled to compensation equal to the pre-regulation value of the property and that the wetlands regulations effected an unconstitutional taking of her property to the extent that they reduced its market value.²⁶

The court agreed with the Town: "Whatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by the claimant here who took title after the redefinition of the relevant property interests."²⁷ In addition, because the property was subject to the private covenant, the wetlands regulations did not deprive the landowner of any interest that had not already been encumbered.²⁸ Judge Wesley concurred, noting that his agreement with the court's outcome was based entirely on the presence of the covenant.²⁹

arose only after the City raised the elevation of the abutting street, a fact that the property owners could not have foreseen. *See id.* at 325. In their view, the lateral support obligation requires only "the preservation of existing support" and not "the obligation to create the level of additional support" that the change in the road elevation necessitated. *Id.* at 326. The dissenters also implied that the only public notice of the encumbrance, a map filed in the office of the Queens Borough President, was inadequate to place prospective purchasers on notice that the physical location of the street was lower than the legal location of the street. *See id.* at 320.

²⁵ 678 N.E.2d 489, 490 (N.Y. 1997) (mem.).

²⁶ *See id.*

²⁷ *Id.* at 490-91.

²⁸ *See id.* at 491; *see also id.* (Wesley, J., concurring). The former owner agreed to covenants limiting development on this parcel in return for the right to subdivide for development other portions of the larger parcel it owned at the time. *See id.* (majority opinion). Thus, the former owner effectively redistributed the value of the original larger lot, making other portions of it more valuable for development and this portion less valuable as undevelopable wetlands. To the extent that the claimant here neglected to factor this reallocation into her purchase price, she erred, but that error should not lead to financial responsibility years later on the part of the Town. *See infra* note 78 (discussing effect of miscalculations).

²⁹ *See Basile*, 678 N.E.2d at 491 (Wesley, J., concurring). Judge Wesley did not explain his greater willingness to defer to prior private covenants than to prior public regulations. Judge

The petitioner in *Anello v. Zoning Board of Appeals*³⁰ acquired property in the Village of Dobbs Ferry two years after the effective date of a steep slope ordinance that prevented her from constructing a one-family home on the land. After the Village denied a variance, petitioner brought suit, arguing that her property had been taken without compensation. The Court of Appeals rejected her claim, because the pre-existing statute “encumbered petitioner’s title from the outset of her ownership and its enforcement does not constitute a governmental taking of any property interest owned by her.”³¹ Judge Wesley dissented, arguing that the post-enactment buyer of the property should have the same right to seek takings compensation as the pre-enactment owner had.³²

B. Unanswered Questions Concerning Pre-Enactment Owners

For reasons that I will explore in the next Part, the court reached the correct result in all four cases.³³ Its job was made easier, however, by the fact that all four claimants purchased their property after a land use restriction had become effective, with actual or constructive notice of that restriction. The harder questions arise when we turn our attention to the earlier owners of these parcels, persons who acquired their land before these changes in the law took effect and then had to sell to persons who were aware of the intervening changes in the law. Judge Wesley raised the right issue in the wrong case, in his *Anello* dissent:

The majority holds that Mrs. Anello had already been restricted from developing the property by the ordinance itself, because the ordinance had been in effect for two years before she acquired the property. If so, then for any parcel of property that is completely deprived of its value by the ordinance, the Village has, “by ipse dixit, . . . transform[ed] private property into public property without compensation” once the parcel is transferred to another.³⁴

Titone did not participate. *See id.*

³⁰ 678 N.E.2d 870, 870 (N.Y. 1997).

³¹ *Id.* at 871. The court noted that parties in this situation retain the right to challenge the validity of the restrictions altogether. *See id.* Landowners also may seek variances, as the court implicitly recognized. *See id.* at 870–71 (discussing Anello’s pursuit of variance and noting that lower court found Village’s variance denial to be supported by substantial evidence and neither arbitrary nor capricious). However, they may not pursue a claim for takings compensation. *See id.* at 871; *see also infra* note 92.

³² *See Anello*, 678 N.E.2d at 872–73 (Wesley, J., dissenting). Judge Wesley argued that “[t]he fact that a parcel is transferred should not make a once-compensable taking become noncompensable.” *Id.* at 872. Judge Titone once again took no part in the case. *See id.* at 874.

³³ *See infra* Part III.C.1.

³⁴ *Anello*, 678 N.E.2d 870, 872 (Wesley, J., dissenting) (quoting *Lucas v. South Carolina*

This would have been a serious concern in a case brought by Anello's predecessor-in-title, who might credibly have argued that her reasonable investment-backed expectations were impaired or even destroyed.³⁵ For the plaintiffs in the four New York cases, however, the argument fails, and the court carefully crafted its opinions to avoid addressing issues that might have been raised by other persons.³⁶

If the court had been in a position to examine more systematically the rights of pre-enactment owners and their post-enactment buyers, it might have been able to develop a coherent and comprehensive set of rules to address the concerns of all parties. This more extensive legal structure would ensure that government entities cannot escape liability if they take private property, even if the property changes hands soon afterwards. At the same time, this analysis would avoid an expansion of the rules requiring government payment of compensation. The New York Court of Appeals could have written a more complete analysis had it addressed these issues, but that is affirmatively not its job; rather, attempting to formulate that analysis is mine.

Courts and commentators continue to disagree as to what government actions should be treated as takings, and I do not intend to weigh in on that debate here. Rather, I will propose a structure that will ensure that takings are compensated and that non-takings are not compensated, irrespective of whether the property is sold after the enactment of the regulation. If someone is entitled to compensation, then someone should get it. Once the courts clarify who will receive this compensation, the parties can factor the likelihood and size of the takings compensation that a court might award later into their sale price.

All four of the New York cases presented owners who acquired their land

Coastal Council, 505 U.S. 1003, 1031 (1992) (quoting *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980))).

³⁵ For a discussion of reasonable investment-backed expectations and limitations inherent in an owner's title, see *infra* notes 76, 87.

³⁶ See *Kim v. City of New York*, 681 N.E.2d 312, 319 n.9 (N.Y. 1997) (observing that "plaintiffs alleged that the prior owners of the property deliberately failed to tell them of the City's plan to raise the street to its legal grade," and concluding that "this sort of claim is properly asserted against other parties to the transaction, not against the City of New York in the guise of a takings claim"); *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1039 & n.4 (N.Y. 1997) (observing that it is "[the] redefinition of a landowner's title that can serve as the basis of a takings claim," and noting that "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court. Petitioner does not base his claim on such grounds and we decline to reach the question"); *Anello*, 678 N.E.2d at 872 n.2 (declining to address question of whether Anello's predecessor-in-title could have transferred takings claim to Anello, preferring to "leave for another day the issues of transferability left open by these cases"); *Basile v. Town of Southampton*, 678 N.E.2d 489, 490-91 (N.Y. 1997) (acknowledging that prior landowner may have had takings claim).

with actual or constructive notice of an existing land use restriction from someone who had not fully tested the boundaries of that restriction. The court had no need to consider parties who had acquired their land before a new restriction became effective, because none of the plaintiffs fell into that category. Similarly, the court did not have to distinguish between physical takings and regulatory takings, between ripe claims and unripe claims, or between facial claims and as-applied claims. In the next Part, I will draw these distinctions and will illustrate how changes in the facts might lead to different conclusions. For example, suppose the steep slope regulations in *Anello* had facially taken Anello's predecessor's property by reducing its value nearly to zero? Suppose Gazza's predecessor had applied unsuccessfully for a building permit and then had commenced a takings claim before transferring the property to Gazza? Or suppose Gazza's predecessor had applied for a building permit but had not yet received a response? What if Basile had acquired title to her property upon the death of her predecessor-in-title, or had received it as part of a partnership liquidation, or had purchased it at the foreclosure of a mortgage granted by the prior owner before a new land use restriction took effect? The court recognized some of these questions but pointedly (and properly) avoided deciding any of them.³⁷ In the next Part, I will confront each of these issues and will propose a comprehensive approach for analyzing cases that arise when a pre-enactment owner sells property to a post-enactment buyer.

III. EXTENDING THE ANALYSIS TO THE PRE-ENACTMENT OWNER

When a property owner learns that a government body has just imposed new constraints on the use of that property, she is likely to be disappointed. In a small percentage of these cases, the government action will rise to the level of a regulatory taking, for which the owner is entitled to just compensation. The analysis becomes further complicated if the owner conveys the property after the restrictions become effective but without determining the impact of the new restrictions. The two consecutive owners will have formed their expectations as to how the property might be used against different regulatory backgrounds. The original owner likely received less for her property as a result of the existence of the new limitations, because the purchaser factored into his offer the likelihood that the property would be less profitable as a result.³⁸ The buyer, in turn, will be gambling that the newly restricted property will turn out to be more usable than it

³⁷ See, e.g., *Kim v. City of New York*, 681 N.E.2d 312, 318 n.7 (N.Y. 1997) (observing that if plaintiffs had purchased property before defendant filed map announcing its intention to raise grade of street, "a different takings question might be presented").

³⁸ For purposes of pronoun clarity, this Article will assume a female seller and a male buyer throughout, except when referring to actual opinions in which this was not the case.

seems, because he can receive a variance, can succeed in challenging the applicability of the law to the land, or, perhaps, can recover compensation for a taking. This Part will focus on the reasonable investment-backed expectations of people who sell property that became subject to land use restrictions during their ownership and on the reasonable investment-backed expectations of people who buy from these sellers.

A. *Facial Claims*

Begin by imagining a law that, on its face, destroys an owner's discrete, pre-existing property rights. For example, a county might enact an ordinance requiring a property owner to dedicate a three-foot strip along every public street for construction of sidewalks.³⁹ This ordinance would physically take private property—either a fee simple or an easement—on its face.⁴⁰ The taking occurs

³⁹ A hypothetical that portrays a permanent physical occupation of land may not be the most subtle example to use because of the Court's categorical treatment of such cases as takings. See *infra* note 40. This special treatment is reflected in cases in the lower federal courts. See, e.g., *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) (plurality opinion); see also discussion *infra* note 47. However, a permanent physical occupation illustrates most starkly the type of bare facial taking that I wish to portray in this Section. In the unlikely event that any predecessors-in-title had happened to own the *Kim* property when the common law of lateral support went into effect, they might have fallen within this category and could have argued that parts of their previously unencumbered fee now must be physically occupied by fill to support the abutting public road. See *supra* Part II.A (discussing *Kim*). Most likely, this common law burden predates the Takings Clause!

This Section also will consider a downzoning hypothetical that is only slightly more nuanced. See text accompanying *infra* notes 42–43. The predecessor to the property owner in *Anello* faced facts similar to this hypothetical. That predecessor owner might have argued persuasively that the residential lot became unbuildable by virtue of the Village's new steep-slope ordinance. See *supra* Part II.A.

The two Sections that follow consider the more equivocal and vexatious (and interesting) cases. See *infra* Parts III.B–C.

⁴⁰ See *Babbitt v. Youpee*, 519 U.S. 234, 241–43 (1997) (holding that statute providing that certain small fractional interests in Indian land escheat to tribe upon death of owner works taking without just compensation); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425–26 (1982) (holding that permanent physical occupation of private property constitutes compensable taking under Fifth Amendment); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (holding that government could not require owners of private marina to keep it open to public without compensating owners, even though marina had become part of navigable waters of United States after owners dredged it and connected it to Pacific Ocean). Cf. *Dolan v. City of Tigard*, 512 U.S. 374, 392–96 (1994) (finding taking when city conditioned granting of building permit upon owner's agreement to deed portions of her land to city for drainage purposes and for use as bicycle path).

The law in *Kim* was somewhat different in that it did not lead to an immediate loss or

the moment the law becomes effective, even if no one ever actually uses the strip of land, because the county has appropriated the owner's power to exclude.⁴¹ Or the county might downzone a property owner's land so substantially that the land effectively becomes unusable for any economically viable purpose.⁴² Once again, this change in the law might facially take the owner's property, this time by regulation.⁴³ In either case—the physical taking or the regulatory taking—the

occupation of the property, but rather authorized a physical occupation in the future. *See Kim v. City of New York*, 681 N.E.2d 312, 313 (N.Y. 1997) (noting that City authorized regrading of street in 1978 but did not actually regrade it until 1990, while plaintiffs acquired land in 1988); *id.* at 319–20 (Smith, J., dissenting) (same). The earlier act, authorizing the occupation, is the act that is more likely to work a taking of the property; the subsequent placement of fill represents nothing more than the City's use of a right it already had acquired. *Cf. infra* notes 200–01 and accompanying text (discussing similar issue in mortgage context).

The plaintiffs in *Kim* were forced, for two reasons, to argue that the placement of fill constituted the taking. First, if the authorization had already worked a taking, then the plaintiffs had purchased the property after the restriction took effect and fell into the same category as the plaintiff in *Gazza*. Second, the authorization had occurred twelve years earlier, which means that if the authorization had already worked the taking, then the statute of limitations on the takings claim might have expired. *Cf. Kim*, 681 N.E.2d at 326 (Smith, J., dissenting) (arguing that, "[u]ntil the City actually raised the grade of the street, however, it would have been impossible to determine the extent of any necessary taking of the property of plaintiffs or any other adjoining landowners").

⁴¹ In some factual settings, the critical taking event may occur before title officially passes to the condemnor, whether the taking is by physical occupation or by regulation. *See, e.g., United States v. Dow*, 357 U.S. 17, 21 (1958) (holding that if condemnor takes possession before acquiring title, taking occurs at earlier time); *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 919 (Minn. 1975) (holding that right to compensation vests when condemnor takes possession of property even if that is prior to formal passage of title); *Argier v. Nevada Power Co.*, 952 P.2d 1390, 1393 (Nev. 1998) (*per curiam*) (same). *See generally* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (describing Takings Clause as "self-executing") (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)).

Conversely, in some cases involving inverse physical condemnation, the taking may occur at a time later than the original invasion by the government. For example, in a case in which the federal government gradually flooded an owner's property during the time when it was constructing a dam, the taking was deemed not to have occurred until after the situation had stabilized. *See United States v. Dickinson*, 331 U.S. 745, 749 (1947). The government hardly can complain about the delay in the occurrence of the taking and the delay in the running of the statute of limitations when it fails to take the land expressly and relies instead upon a gradual inverse taking.

⁴² *Cf. Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1172 (Fed. Cir. 1991) (finding a taking because "[b]efore [the new surface mining law] was enacted, Benefits had a property right it could expect to exercise, i.e., to surface mine the Whitney coal. The moment [the law] was enacted, Benefits no longer had that property right").

⁴³ Depending upon the facts and the scope of the law, this second set of facts could constitute an as-applied taking rather than a facial taking. *See infra* Parts II.B–C (discussing as-

owner's right to seek takings compensation in the designated state forum would ripen as soon as any facial taking occurs and the statute of limitations on her state claim would begin to run at the same time, which means that if the owner were to wait too long to commence proceedings, her claim would expire.⁴⁴

What if this owner were to sell the property after the law became effective? If the statute of limitations already has expired, then neither the original owner nor her buyer may seek compensation. The original owner has allowed her opportunity to bring a takings claim to lapse and cannot recapture it.⁴⁵ This situation differs little from that in which a trespasser adversely possesses a rightful owner's property: Once the adverse possession period expires, the act becomes irreversible and the trespasser is transformed into an owner.⁴⁶ The

applied takings). Moreover, if the nuisance exception applies, these facts might not work a taking at all. *See infra* notes 76, 87 (discussing the nuisance exception). For purposes of this illustration, however, assume that the facts work a facial regulatory taking, as they sometimes will.

⁴⁴ *See* *Drabek v. City of Norman*, 946 P.2d 658, 661–62 (Okla. 1996) (finding that inverse taking occurred when city constructed water main on private property without first condemning it). *See generally* ROBERT MELTZ ET AL., *THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION* 107–16 (1998) (distinguishing between facial and as-applied takings claims).

Any right of the owner to seek compensation in *federal* court would not ripen until the state proceedings had concluded. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985) (laying out ripeness standard for cases in federal court); *Norco Constr., Inc. v. King County*, 801 F.2d 1143, 1145 (9th Cir. 1986) (Kennedy, J.) (holding that "under federal law the general rule is that claims for inverse taking . . . are not matured claims until planning authorities and state review entities make a final determination on the status of the property"); Gregory M. Stein, *Regulatory Takings and Ripeness in the Federal Courts*, 48 VAND. L. REV. 1 (1995) (discussing ripeness standard applied in federal regulatory takings cases).

⁴⁵ *See, e.g., Trail Enterprises, Inc. v. City of Houston*, 957 S.W.2d 625, 631 (Tex. App. 1997) (holding, in facial takings case, that statute of limitations begins to run when interference with right to use property first occurs, not when owner later seeks to use restricted property).

The Supreme Court has made a similar statement in a somewhat different context. *See Texaco, Inc. v. Short*, 454 U.S. 516, 530 (1982) (observing, in case involving mineral interests that lapsed after owners failed to renew their claims to them, that "[i]t is the owner's failure to make any use of the property—and not the action of the State—that causes the lapse of the property right; there is no 'taking' that requires compensation"). The text example differs from *Texaco* in that it hypothesizes an actual taking, but in both cases the owner allows the time in which it can address the problem to expire.

⁴⁶ The remedies available before the statutory period expires will differ in these two cases. In the case of an adverse possession, the rightful owner would be entitled to a judgment quieting their title and enjoining further trespass by the would-be adverse possessor. In the case of a physical taking, the owner would be entitled to takings compensation. If the government entity chooses to keep the regulation in force, then it has permanently taken a fee or an easement. *See generally First English Evangelical Lutheran Church*, 482 U.S. at 321 (noting

original owner cannot resurrect an expired takings claim by conveying her property to a third party, the buyer should pay a price for the land that reflects the full impact of the restriction, and the government entity enjoys the benefits of the expired statute of limitations no matter what the original owner does with the property.⁴⁷ The value of the original owner's property becomes permanently

that "[o]nce a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain"). Even if the government decides to abandon the regulation, however, it owes the owner compensation for a temporary taking. *See id.* at 318–19 (holding that if government takes property temporarily, "the Just Compensation Clause of the Fifth Amendment requires that the government pay the landowner for the value of the use of the land during this period").

⁴⁷ At least one court distinguishes between physical and regulatory takings in deciding whether post-enactment purchasers should be deemed to be on notice of the law in effect at the time they acquire title. *See Preseault v. United States*, 100 F.3d 1525, 1540 (Fed. Cir. 1996) (en banc) (plurality opinion). In *Preseault*, a physical occupation case, the Federal Circuit rejected an argument similar to the one that the New York court relied upon in all four of its cases. *See id.* The plurality observed that when the taking arises from a physical occupation, the "issue of title and ownership expectations must be distinguished from the question that arises when the Government restrains an owner's use of property through zoning or other land use controls, without disturbing the owner's possession." *Id.* (emphasis omitted). The opinion went on to note that "the owner's reasonable investment-backed expectations have been held to be relevant to the question of whether a regulatory imposition goes too far in constraining the owner's lawful uses of the property." *Id.* (citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)); *see also* *Good v. United States*, 39 Fed. Cl. 81, 113–14 (1997) (interpreting *Preseault* as requiring it to distinguish between physical and regulatory takings), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999).

Kim is the only one of the four New York cases discussed in this Article that involved a physical occupation of property, and *Kim* is entirely in accord with *Preseault*. Both property owners bought land that was subject to the rights of another. In *Kim*, the City of New York had the right to place fill on the plaintiffs' land for purposes of supporting an abutting roadway, and when it did so, the plaintiffs could not recover compensation. *See supra* notes 14–24 and accompanying text. In *Preseault*, a railroad had the right to run trains across the plaintiffs' property. Had the railroad done so, the plaintiffs could not have recovered compensation, putting aside the hotly disputed question of whether the railroad subsequently had abandoned its easement. But when the federal government told the Preseaults that it was unilaterally converting a railroad easement into a nature trail, the Preseaults recovered. This result is unavoidable, because the Preseaults always owned the right to bar hikers from the property they owned: a fee simple subject to a railway easement. *See MELTZ ET AL.*, *supra* note 44, at 31 (discussing *Preseault* and concluding that "[a] land purchaser does not 'expect' that he or she will be asked to suffer *that* consequence noncompensably") (emphasis in original; footnote omitted).

Thus, in many important respects, *Preseault* is much like *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). *See* discussion *infra* notes 93–104 and accompanying text. Both cases involved landowners who prevailed because they could not have foreseen how the government later would act. *See also* MELTZ ET AL., *supra* note 44, at 30 & n.27 (inferring

fixed at a lower level once the right to bring a takings claim expires,⁴⁸ but the owner hardly can complain about her own failure to respond to a facial taking over a protracted period.⁴⁹ To allow the buyer to recover from the government

from *Lucas* that “the buyer of land obtains fewer rights than the seller originally acquired if the government puts new use restrictions in place during the seller’s period of ownership” and questioning whether Court would apply this approach to cases involving physical invasions). *Accord* *Applegate v. United States*, 35 Fed. Cl. 406, 415 (1996) (distinguishing, in case involving owner who acquired land after government’s construction of dam, between land already subject to federal navigational servitude and other land subject to ongoing erosion and flooding caused by dam and finding taking only in latter case). *See generally* *United States v. Dickinson*, 331 U.S. 745, 747–49 (1947) (distinguishing between takings at discrete moments in time and takings arising from ongoing flooding); discussion *supra* note 41.

⁴⁸ There is always the possibility that the buyer, too, will fail to recognize that a portion of the property has been taken by the government. If this happens, then the new owner has overpaid, paying for a complete bundle of rights but receiving an incomplete bundle. The buyer may then have some recourse against the original owner—under a general warranty deed, perhaps—but cannot recapture the lost property rights or compensation for them from the government. He suffers as a result of his own miscalculation. *See infra* note 78 (discussing miscalculations). *Cf. Kim v. City of New York*, 681 N.E.2d 312, 313 n.1 (N.Y. 1997) (noting that plaintiffs had asserted cause of action against prior owners and prior owners’ attorneys for fraud in connection with sale of property).

⁴⁹ Judge Wesley argued in his dissent in *Anello* that “the majority’s reasoning effectively forces New York property owners to keep abreast of regulatory enactments and, if an enactment appears to deprive a parcel of its economic value, to seek compensation for the taking.” *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 873 (Wesley, J., dissenting). He continued by expressing his concern that some property owners would not meet this responsibility: “Any property owner who overlooks or misinterprets a regulatory enactment, or who lacks the resources to commence a taking action, cannot transfer the property to someone else without destroying the property’s value.” *Id.*

Even if one accepts Judge Wesley’s argument, the changes in the law he discusses are not just any changes but actually are the rare changes that are so significant that they take an owner’s property by virtue of their existence. Any owner who is unaware of a major change of this type surely will figure it out when she asks all of her potential buyers why they are offering so much less for the property than she believed it to be worth. Some owners, of course, may not attempt to sell their property during the limitations period and may lose their claims before they knew they had them. Just as owners who do not police their property may forfeit their land to trespassers if they fail to evict them within a seven-, ten-, or twenty-year period, owners who do not keep abreast of major changes in the law may lose their land (or some uses of it) if they fail to object within the statutory period. Even a government entity that dramatically violates a constitutional right is entitled to the benefits of a statute of limitations. *Cf. Texaco, Inc. v. Short*, 454 U.S. 516 (1982); *see also* discussion *supra* note 45; *id.* at 540 (Brennan, J., dissenting).

Moreover, the pre-enactment owner will retain the ability to structure a transfer of her property in a way that does not preclude her from later bringing a takings claim. *See infra* notes 130–37 and accompanying text.

after the limitations period expires would be to grant the buyer (and the seller) a windfall at taxpayer expense.⁵⁰

If the owner conveys the property after the law becomes effective but before the statute of limitations expires, then either the seller retains the takings claim or the buyer succeeds to the seller's right to bring a takings claim for the remainder of the limitations period. Either of these solutions will lead to a fair result as long as the parties know what the law is in advance, but the courts have shown a clear preference for the former rule—under which the seller retains the claim—particularly in cases involving physical takings.⁵¹ Under this rule, the buyer pays a price equal to the post-enactment value of the land and receives the reduced

⁵⁰ “Any compensation received by a subsequent owner for enforcement of the very restriction that served to abate the purchase price would amount to a windfall, and a rule tolerating that situation would reward land speculation to the detriment of the public fisc.” *Anello*, 678 N.E.2d at 871.

If the parties instead had failed to recognize at the time of the transfer that there had been a taking, they still would receive a windfall at taxpayer expense, but now it would be the seller that benefits and not the buyer. The buyer would overpay, recover compensation “to the detriment of the public fisc,” and eventually break even, while the seller would receive the pre-taking value of the property even though she had allowed her takings claim to expire. This result should not occur.

Either way, one of the parties benefits as a result of this de facto extension of the statutory period, and the government loses. If the parties are aware of this possibility and strategize together, they might even agree to a division of this windfall. There is no justification for any of these results if a property owner has allowed a legislatively-determined statute of limitations period to run out.

⁵¹ See, e.g., *Argier v. Nevada Power Co.*, 952 P.2d 1390, 1392 (Nev. 1998) (per curiam) (observing in physical takings case decided under state law that owner at time of interference with possession is entitled to compensation and that owner who then sells what remains of property does not also sell right to compensation); *Hoover v. Pierce County*, 903 P.2d 464, 468–69 (Wash. Ct. App. 1995) (holding in physical takings case decided under state law that when county's construction of road and culvert led to intermittent flooding of neighboring lots, owner at time of taking or injury is proper person to initiate takings claim). Cf. *Drabek v. City of Norman*, 946 P.2d 658, 662 (Okla. 1996) (following same rule under state law but recognizing exceptions if original owner is unaware of taking or if original owner specifically transfers right to recover to vendee). Moreover, when the condemnor is the United States, the Assignment of Claims Act, 31 U.S.C. § 3727 (1994), ordinarily will force the seller to retain the claim. See *infra* notes 57, 62.

See generally JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN § 5.01[5][d][i] (1998) (noting that owner at time of taking is entitled to compensation, and concluding that “if the [land] changes hands after the taking has occurred but before the compensation has been paid, the right to receive the compensation does not run with the land but remains a personal claim of the person who was the owner . . . at the time of the taking”) (footnote omitted); *id.* § 5.02[3] (making similar point and also noting that “[i]t is unimportant that the question of compensation is deferred”) (footnote omitted).

bundle of rights that he paid for.⁵² The original owner sells her property at a price that reflects the devaluation that the change in the law has caused⁵³ while also retaining the right to pursue a takings claim.⁵⁴ If she prevails, then she receives compensation. If she is wrong, then she has suffered a noncompensable regulatory loss—one of the risks inherent in real estate investment—just as she would have if she had retained the property throughout.

Alternatively, the buyer might succeed to the seller's right to bring a takings claim against the government for the remainder of the limitations period. If the statute of limitations on an inverse condemnation is comparable to the period for adverse possession, then this buyer would enjoy the remainder of the original limitations period just as a buyer from an ousted but rightful property owner would under the tacking doctrine employed in adverse possession cases.⁵⁵ This

⁵² See *United States v. Dow*, 357 U.S. 17, 27 (noting that "Dow took his deed with full notice of the condemnation proceeding brought by the United States" and that "he could have protected himself vis-a-vis his grantors against the contingency that his claim against the United States would be subsequently invalidated by the Anti-Assignment Act"); see also *Creppel v. United States*, 33 Fed. Cl. 590, 600 (stating that "[s]ubsequent transferees, by definition, are not parties to this exchange [between the original owner and the government], because whatever interest these individuals hold is necessarily distinct from the property already taken by the Government"); *Hoover*, 903 P.2d at 469 (observing that "[t]he purchase price of the property, therefore, either did reflect or should have reflected the diminished value of the land caused by its propensity to flood").

The seller had better think carefully about the wording of any warranties in the deed she delivers to her buyer. See SACKMAN, *supra* note 51, § 5.02[3][c] (observing that deed will not pass previously vested award to buyer but that buyer nonetheless may have claim under warranties contained in deed).

⁵³ The drop in sale price that the change in law causes should be partially offset by the possibility that she will win her takings claim. See *infra* text accompanying note 116.

⁵⁴ See *Kindred v. Union Pacific R.R. Co.*, 225 U.S. 582, 596–97 (1912) (concluding that "the right to exact payment [for an earlier taking of a right-of-way] belongs to the owner at the time the company entered and constructed the road"); see also *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (Minn. 1975) (noting that compensation replaces lost property and concluding that if original owner sold right to compensation, she would suffer loss and purchaser would enjoy windfall); *Argier*, 952 P.2d at 1392 (reaching same conclusion and citing *Brooks*); *infra* note 62 (discussing Assignment of Claims Act).

Of course, this conclusion assumes that the parties did not intend for the seller to convey the right to compensation and did not factor the value of that conveyance into the sale price. See *infra* notes 58, 75 (discussing complexities of this type of calculation). Cf. SACKMAN, *supra* note 51, § 5.02[3] (observing that, when taking is deemed to have occurred *after* conveyance of title, compensation belongs to purchaser, while also noting that pre-enactment owner and post-enactment purchaser can reverse this presumption contractually).

⁵⁵ Tacking is "the adding together of periods of [adverse] possession that are continuous but by different persons." ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 11.7, at 814 (2d ed. 1993). The discussion in the text applies the tacking doctrine to the rightful owner

rule should create few problems of proof in facial takings cases: The only liability question is whether the law facially took the property that the buyer now owns, and all of the relevant events have occurred and probably can be proved even if the original owner is unavailable or uncooperative when the buyer brings his case.⁵⁶

Under this second alternative, the buyer purchases both the regulated land and the takings claim.⁵⁷ This forces the parties to agree on a value for the takings claim when the original owner sells her land, a value that reflects the parties' estimates of whether the claim will succeed and how much it will be worth.⁵⁸

rather than to the trespasser, but the doctrine can apply to either party.

⁵⁶ In a facial takings case, the only question is whether the mere existence of the law works a taking. *See* Stein, *supra* note 44, at 18–19. Contrast this with an as-applied case, in which the actions of the owner and the government entity over an extended time period are critically important. *See id.* at 20–25; *see also infra* Parts III.B–C; *infra* notes 63–64 and accompanying text (noting problems of proof that may arise).

⁵⁷ This option is not available in a claim against the United States. *See supra* note 51; *infra* note 62 (addressing effects of Assignment of Claims Act). The New York Court of Appeals, in contrast, entertained this possibility without determining its validity. *See* *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1997) (deferring consideration of issue); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 872 n.2 (N.Y. 1997) (same).

⁵⁸ Parties who know beforehand that the state will follow this approach should be able to calculate a sale price that factors in both the likelihood that the buyer will prevail on a takings claim and the magnitude of the compensation that will result. The sale price will be lower than the constant-dollar value of the land before the regulation became effective but higher than the value of the land if the regulation is valid and noncompensable, reflecting the range of possible outcomes of the takings claim. *See infra* note 75.

The court should recognize that the taking may be only a temporary one so far, because the government entity may choose to amend or abolish the restriction upon learning that it will be unexpectedly expensive. *See* *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 318–19 (1987) (recognizing compensability of temporary takings). This temporary takings compensation should be calculated over the period from the effective date of the offending law through the date the government changes the law. The government must pay this compensation either to the original owner or to the buyer, depending upon which of the two rules discussed in the text is adopted by the court.

If the government opts to convert the temporary taking into a permanent one, then it takes the property outright from the current owner as of the date of this conversion. There actually will have been two takings: a temporary one, followed by a permanent one. All of the compensation for the permanent taking belongs to the buyer, who owned the property at the time the permanent taking became effective. The text's discussion of claims that are retained by the original owner or conveyed to the buyer would apply only to the just-ended temporary taking. As a result, the government might end up paying temporary takings compensation to the original owner and permanent takings compensation to the new owner. *See generally* Gregory M. Stein, *Pinpointing the Beginning and Ending of a Temporary Regulatory Taking*, 70 WASH. L. REV. 953, 980–84 (1995).

The seller receives a liquidated amount for the takings claim at the closing and conveys to the buyer the risk that the claim will fail or lead to an unexpectedly small award. The buyer purchases these risks along with the land. He pays an intermediate price that is lower than the original value of the land but higher than the value of the newly regulated land and also acquires the right to sue the government for an amount reflecting the drop in value that the new restriction caused.⁵⁹

There is no conceptual reason why a court could not allow the parties to choose contractually between these two options, permitting the seller either to retain the claim or to convey it to her buyer.⁶⁰ In this way, the party that is more risk-averse, whether that party happens to be buying or selling, can liquidate its risk at the time of the sale. The less risk-averse party serves as insurer and receives a premium for this service.⁶¹ The government entity should be indifferent between these two options, because it wins or loses either way based

⁵⁹ In individual cases, a buyer actually may appear to receive a windfall. The buyer ordinarily should receive a reduction in his purchase price—as compared to the pre-enactment value of the property—that reflects the range of possible outcomes of his takings case. If he then wins his case, he will receive compensation for the entire drop in value caused by the regulation, a result that might make it seem that he has come out ahead in the individual case.

Along with these apparent windfalls will be cases in which the buyer pays a price that reflects the chance that he will win, but then loses. In these cases, he will appear to have overpaid for the property. If the parties are able to calculate these numbers with some degree of certainty, then the buyer's victories and defeats should balance out.

This discussion overlooks the fact that the buyer is serving as an insurer and is entitled to be compensated for bearing this risk. *See infra* note 150 (discussing risk premiums). It also does not consider the costs of litigating a takings claim. *See infra* note 150 (discussing transaction costs of takings claims).

⁶⁰ "Because the right to damages for an injury to property is a personal right belonging to the property owner, the right does not pass to a subsequent purchaser *unless expressly conveyed*." *Hoover v. Pierce County*, 903 P.2d 464, 469 (Wash. Ct. App. 1995) (emphasis added). The court continued, however, "that no taking damages should be awarded to plaintiffs who acquired property for a price commensurate with its diminished value." *Id. Accord Drabek v. City of Norman*, 946 P.2d 658, 662 (Okla. 1996) (holding that owner at time of taking is entitled to compensation, but recognizing exceptions if this owner is unaware of taking or if this owner specifically transfers right to recover to vendee).

See also 29A C.J.S. *Eminent Domain* § 194 (1992) (observing that "[d]amages for the taking of land . . . belong to the one who owns the land at the time of the taking . . . , and they do not pass to a subsequent grantee of the land, except by a provision to that effect in the deed or by separate assignment") (footnotes omitted). At least one court has expressly relied heavily on the reasoning of this treatise and cited directly to this provision. *See Argier v. Nevada Power Co.*, 952 P.2d 1390, 1391 (Nev. 1998) (per curiam).

Two of the cases considered this issue and expressly declined to decide one way or the other. *See supra* note 57 (discussing treatment of this issue in *Anello* and *Gazza*).

⁶¹ *See infra* note 150 (discussing risk premiums).

solely on whether it took the property facially. The only difference to the government is the identity of the payee, if there turns out to be one.

A court nonetheless may prefer to leave the claim in the hands of the original owner. Courts and legislatures sometimes are wary of rules that allow legal claims to be bought and sold.⁶² Permitting the assignment of ripe facial claims also may lead to problems of proof if the case ever is tried.⁶³ The new owner of the property will be in the position of arguing that the original owner's reasonable investment-backed expectations, rather than his own expectations, were impaired. This might require the presence and participation of a former owner who may have little interest in cooperating, and who certainly will have less interest in her buyer's claim than she would have had in her own. Thus, although it may appear from a purely economic perspective not to matter which party may bring the takings claim, courts are likely to prefer a rule that leaves the claim with the original owner.⁶⁴

B. *Ripe As-Applied Claims*

Now imagine a less intrusive law that restricts property rights by requiring those who wish to build to seek approval from an agency with the discretion to grant or deny it. The requirement that an owner seek permission will not, by itself, constitute a facial taking of private property,⁶⁵ and the question instead

⁶² If the condemnor is the United States, then the Assignment of Claims Act, 31 U.S.C. § 3727 (1994), ordinarily requires the owner at the time of the taking to retain the claim and permits an assignment to the purchaser only in limited circumstances. *See United States v. Dow*, 357 U.S. 17, 20 (1958) (noting that "[i]t is well established . . . that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property"); *see also Argent v. United States*, 124 F.3d 1277, 1287 (Fed. Cir. 1997) (remanding for determination of whether some plaintiffs acquired property after taking had already occurred and thus were barred under rule of *Dow*); *Creppel v. United States*, 33 Fed. Cl. 590, 599–600 (1995) (recognizing that, under *Dow*, only owner at time of taking may maintain claim). Note that the *Dow* Court categorically rejected the possibility of dividing the compensation between the two owners. *See Dow*, 357 U.S. at 26.

⁶³ *See infra* Part III.F (discussing unripe as-applied claims, in which these problems of proof may be substantial); *see also infra* note 72 (contrasting assignability of ripe and unripe claims).

⁶⁴ These concerns are even more pronounced if the claim is not yet ripe. *See supra* note 63.

⁶⁵ *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126–27 (1985). The *Riverside Bayview* Court stated that:

becomes whether the application of the law to specific land takes the property. In an as-applied case, the owner argues that the application of the law to her land works a taking even though the law might be applied to other land without any need for compensation.

An as-applied claim differs significantly from a facial claim, and the difference between these two legal arguments has led courts to apply a more demanding ripeness test in as-applied cases.⁶⁶ A court cannot determine whether the law goes too far when applied to the owner's land until it knows how far the law goes, and the only way for the owner to test the boundaries of the law is to apply for permission to build and to receive a final decision denying that permission.⁶⁷ In other words, she must pursue at least one permit application through all administrative channels until receiving a final "no." If her initial request is too grandiose, she may have to submit a more reasonable application after her first is denied.⁶⁸ As soon as the owner receives a final denial of a realistic permit application, her state law claim for compensation ripens and the statute of limitations on that state law claim begins to run.⁶⁹ If *Gazza's*

[T]he mere assertion of regulatory jurisdiction by a governmental body does not constitute a regulatory taking. . . . The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired.

Id. (citation omitted); see also *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 800-01 (Fed. Cir. 1993) (citing this provision of *Riverside Bayview* and concluding that cease and desist order that still allowed landowner to seek permit did not constitute taking).

⁶⁶ See *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186-97 (1985) (describing as-applied takings claim and explaining ripeness requirements in this type of claim); *Stein, supra* note 44, at 17-26 (distinguishing between facial and as-applied claims and discussing ripeness standards applicable to each).

⁶⁷ While the owner is required to obtain a final decision, she need not exhaust all administrative remedies. See *Williamson County*, 473 U.S. at 192-94 (distinguishing between finality and exhaustion). Moreover, the finality requirement is applied in a somewhat flexible manner. Thus, "[i]t is not necessary for a landowner to engage in a futile, pro forma exercise of agency review when no possibility exists that a permit will be granted." *Broadwater Farms Joint Venture v. United States*, 35 Fed. Cl. 232, 236 (1996). On the facts in *Broadwater Farms*, for example, the court found that "[n]o reasonable landowner would find a 'door left open' for obtaining a permit." *Id.* at 237. Cf. *Howard W. Heck & Assocs. v. United States*, 134 F.3d 1468, 1472 (Fed. Cir. 1998) (considering and rejecting futility argument).

⁶⁸ See *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986) (determining that takings claim was not yet ripe and noting that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

⁶⁹ Once again, her federal claim will not ripen until her state law attempt to receive just compensation runs its course. See *supra* note 44.

predecessor-in-title had retained the property until after DEC denied permission to build, he would have had a ripe as-applied claim, though not necessarily a successful one.⁷⁰

In spite of the differences between these two types of claims, both should be treated in the same way after they have ripened.⁷¹ Once an as-applied claim is ripe, all facts relevant to the outcome have occurred and the limitations clock is ticking. If the original owner allows the statute of limitations to lapse, then her buyer takes subject to the restriction as it applies to the land he has just acquired—the restriction has become a part of the bundle of rights attached to that property. If the statute of limitations has not yet expired, then the original owner either retains the claim or transfers it to her buyer. For reasons of judicial administration and ease of proof, courts may prefer a rule that leaves the claim in the hands of the original owner, but otherwise there may be no particular reason either to favor or disfavor a rule allowing the original owner to transfer the ripe claim to the person who buys the restricted land.⁷² As long as both parties have

⁷⁰ Assume for a moment that Gazza's immediate predecessor-in-title bought the property in its unrestricted state, and later faced wetlands regulations that limited his use of the property but allowed him to test the extent of those restrictions by seeking a permit. Instead of selling the property, assume that he applied for a permit himself. By 1992, he would have known for certain that DEC would not grant permission, and he most likely would have a ripe as-applied claim under state law. See *supra* notes 1–12 and accompanying text (discussing sequence of events in *Gazza*); see also *infra* Part III.E (discussing *Gazza*'s predecessor-in-title).

⁷¹ See *supra* Part III.A (discussing facial claims).

⁷² The New York Court of Appeals expressly withheld judgment on this point, noting in *Gazza* that "[t]he entirely separate inquiry of whether an existing taking claim may be donated, sold, inherited or otherwise assigned is not before this Court. . . . [W]e decline to reach the question." *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1987); see also *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 872 n.2 (N.Y. 1987) (declining to address same issue). These statements make it clear that a silent deed will not transfer the claim, at least not in New York, but leave open the question of whether an "existing" claim, by which the court presumably means a ripe claim in which all of the facts have transpired, may be transferred explicitly.

From a purely economic standpoint, the answer to this question should be irrelevant, and the parties should be able to price the property fairly no matter which rule the court adopts, as long as the court makes clear which rule it plans to follow. In the case of a ripe claim, however, there are stronger reasons to allow the seller to transfer the claim to the buyer if the parties wish. Unlike in the case in which the claim has not yet ripened, see *infra* Parts III.C, III.F, the statute of limitations has begun to run, ensuring that the claim will be litigated within a finite period of time. Moreover, the buyer who acquires and pays for the claim has every incentive to pursue it vigorously. Once a court explicitly confirms that a ripe claim can be transferred, buyers and sellers can agree upon an express transfer of the claim and can factor the expected value of the claim into the sale price. Such a transaction most likely would involve a promise on the seller's part to cooperate with the buyer in his pursuit of the litigation, with this obligation surviving the closing.

adequate notice of the rule the state chooses to follow, they can factor the legal effects of that rule into their assessment of what the property should sell for.

C. Unripe As-Applied Claims: The Core Problem and a Suggested Analysis

Now assume that a person who acquired her land before a new restriction went into effect were to sell her property without first seeking approval for any construction or with a permit application pending. The prior owner of Basile's property seems to have fallen into this category.⁷³ The buyer, who is deemed to be on notice of all applicable laws at the time of the sale, should factor this untested restriction into his calculation of what he is willing to pay for the property.⁷⁴ He should discount the offer he otherwise might have made by an

If less than all of the ripening steps have occurred, then the seller should retain the right to bring a takings claim, the buyer should be treated as having no claim, and the court should be reluctant to allow the seller to transfer her claim to the buyer. *See infra* Part III.C (offering and discussing a solution to this core problem); *see also infra* Part III.F (considering and rejecting other, less desirable solutions to this problem); *infra* Part III.G (discussing several unusual cases in which a different rule might be appropriate). In this situation, the seller transforms her uncertain and hypothetical property loss into a quantifiable financial loss, while the buyer's plans still may be uncertain.

⁷³ *See* Basile v. Town of Southampton, 678 N.E.2d 489, 490–91 (N.Y. 1997) (mem.) (noting that plaintiff acquired title after wetlands law took effect); *see also* discussion *supra* notes 25–29 and accompanying text. The predecessor owner in *Basile* bought unrestricted property and later faced wetlands regulations that limited the use of their property but that allowed them to test the confines of those restrictions by seeking a permit. At the time of the sale to Basile, the predecessor owner apparently never had sought permission to build and did not yet know the effect of these restrictions on the land. *See supra* note 27 and accompanying text.

⁷⁴ Two points merit noting here. First, in order for a party fairly to be deemed on constructive notice of an existing law, that law must be discoverable. There is some question as to just how discoverable the lateral support law was in *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997). *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law"*, 42 N.Y.L. SCH. L. REV. 345, 369 (1998) (asking where map setting forth legal grade of road was located and whether purchaser reasonably could have been expected to find it). The court largely mooted this question in *Kim*, however, when it stated that the law of lateral support has its basis in common law. *See Kim*, 681 N.E.2d at 316 (observing that "[p]laintiffs' obligation to preserve and maintain the legal grade has its roots in New York's common-law obligation of lateral support"). Compare this result to that in *Hunziker v. State*, 519 N.W.2d 367 (Iowa 1994), in which a state law that predated the original owners' transfer of title prohibited disturbing Native American burial mounds and required the placement of buffer zones around them for their protection. *See id.* at 368–70. The court found no taking when the subsequent buyers were unable to use part of their land after discovering a burial mound on it. *See id.* at 371. Note that while the law in *Hunziker* predated the sale of the

amount equal to the diminution in value that a permit denial would cause multiplied by the likelihood that the permit will be denied.⁷⁵

property, the discovery of the Native American remains did not. *See id.* at 368–70.

Second, each state will have to determine whether to assess the purchaser's reasonable investment-backed expectations at the time the contract is signed or at the time of the closing. For example, if a purchaser signs a contract and the law then changes before the closing, was he on notice of the change by virtue of his closing after it became effective, even though he was contractually obligated to close by that time? This issue will be particularly relevant in cases involving installment land contracts, in which the time between signing and closing can be quite long. To answer these questions, a state court surely will have to consider its position on the doctrine of equitable conversion. Moreover, the parties should address these matters in the contract itself. *See generally* SACKMAN, *supra* note 51, § 5.02[3][a] (discussing status of takings claim when property is subject to executory contract).

⁷⁵ The calculation likely will be considerably more complicated than this, because there is a range of possible outcomes. The government need not choose between outright consent and outright denial. More commonly, the buyer will negotiate with the permitting authorities and may agree to scale back his project somewhat. As a result, the buyer's calculation will factor in the wide range of possible outcomes, with each weighted on the basis of its likelihood. The calculation also needs to factor in the likelihood of receiving takings compensation, if such compensation is available, as well as the magnitude of that award. *See In re Town of Islip*, 402 N.E.2d 1123, 1125 (N.Y. 1980) (factoring increment reflecting possibility of rezoning into takings compensation, because "a knowledgeable buyer, recognizing the potential changes in the available uses would make similar adjustments in valuing the property"); *see also* *Berwick v. State of New York*, 486 N.Y.S.2d 260, 263–64, 268–69 (N.Y. App. Div. 1985) (*per curiam*) (discussing some complexities of this type of calculation); *Chase Manhattan Bank v. State of New York*, 479 N.Y.S.2d 983, 985–89 (N.Y. App. Div. 1984) (*per curiam*) (same); Lawrence Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 195–96 (1974) (discussing this calculation with respect to pre-enactment owners and post-enactment buyers).

The buyer needs to add two other ingredients to this brew. First, because the buyer is purchasing the seller's risk and uncertainty, he is entitled to a premium that compensates him for bearing this risk. For a more detailed discussion of this risk premium, *see infra* note 150. Second, the buyer who plans to pursue a permit now must bear the transaction costs of pursuing this permit. *See infra* note 150. These transaction costs are considered a normal part of doing business in the real estate market, and the property owner will not be entitled to be compensated for them by the government even if the court finds that the government took the owner's property. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987) (discussing normal delays inherent in permitting process and suggesting that they are not compensable takings); *see also Chase Manhattan Bank*, 479 N.Y.S.2d at 989 (noting that "[t]he cost in time and money of applying for a permit and challenging in court any denial as confiscatory would naturally be taken into account by any purchaser even if there appeared to be an excellent chance of ultimate success").

Even if a court were to reject the New York approach and allow post-enactment purchasers to pursue as-applied takings claims, the buyer still would have to discount his bid by an amount reflecting the fact that he might bring a takings claim that fails. Here, however, his discount would be smaller, reflecting the fact that he sometimes will win this claim. For a discussion of why this option and several other alternatives are inferior to the approach

A buyer cannot claim that his reasonable investment-backed expectations have been impaired if his expectations were not reasonable and were not backed by his investment.⁷⁶ The buyer's actual or constructive knowledge of the new

recommended here, see *infra* Part III.F.

⁷⁶ This Article will pointedly avoid examining the important questions of what courts view as takings and what they should view as takings. But it is difficult to proceed with the discussion here without highlighting one central distinction in current takings law.

If a government action deprives a current property owner of all economically viable use of her property, that action takes the owner's property by regulation. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992). In other words, a plaintiff who can fit within the narrow category of a total regulatory taking wins fairly easily. This is true unless "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. The Court expanded on this exception by noting that such limitations on the owner's estate "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The goal for a regulatory takings plaintiff, then, is to fall within this categorical rule or within one of the other, very narrow per se rules that the Court has developed, under which she wins her takings claim easily. See, e.g., *supra* note 40 (discussing takings arising from physical occupations of private property). A plaintiff who cannot bring herself within a per se rule must enter a morass of federal decisional law that is not for the weak of heart. In these more ambiguous settings, the Court will "engag[e] in . . . essentially ad hoc, factual inquiries," *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), and will "exercise . . . judgment" at least as much as "logic," *Andrus v. Allard*, 444 U.S. 51, 65 (1979). The Court has developed a number of tests to inform its decisions in these cases, but has not given clear guidance as to when to apply any given test. See generally 1 NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, *AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER* § 5A.02, at 136-37 (1988) (noting that "every case is decided according to the gastronomic school of jurisprudence" and that "[a] dozen-odd phrases . . . have turned up in these cases, ostensibly as a basis for making the decisions," and then listing these phrases); William C. Leigh & Bruce W. Burton, *Predatory Governmental Zoning Practices and the Supreme Court's New Takings Clause Formulation: Timing, Value, and R.I.B.E.*, 1993 BYU L. REV. 827, 834 (discussing "seven classifications or clusters of doctrine, only loosely related to one another"); *id.* at 838 & n.50 (listing "six or seven viable candidates for the exact holding" of *Penn Central*).

Many of these balancing tests are summarized in *Penn Central*. The Court gave special weight to "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Cent. Transp. Co.*, 438 U.S. at 124; see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005-06 (1984) (noting that owner's investment-backed expectations must be reasonable and must be based on existing conditions rather than being mere individual expectations or needs). This Article will emphasize the "reasonable investment-backed expectations" test because that is the test that the New York court probably meant to apply in its four cases. Accord Leigh & Burton, *supra*, at 873 (calling the calculation of reasonable investment-backed expectations "the ultimate issue in most Takings Clause contests").

The New York Court of Appeals relied on the *Lucas* inherent exception when it

decided that Gazza was not entitled to compensation. See *infra* note 82 and accompanying text. Gazza lost because the court determined that the right to build did not inhere in his title to the lot. The inherement test, however, is relevant only when a court is deciding whether to apply the nuisance exception to the *Lucas* rule. As neither Gazza nor the three other plaintiffs in the New York cases suffered a taking of *Lucas* magnitude, the New York court's discussion of inherent property rights appears to have been off the mark. See *infra* notes 81–83 and accompanying text. But see *Anello*, 678 N.E.2d at 872–73 (Wesley, J., dissenting) (suggesting that *Anello* may have suffered deprivation of *Lucas* magnitude). The court's apparent confusion was immaterial, however, for even if it had relied on the more appropriate *Penn Central* test and examined the owner's reasonable investment-backed expectations, it should have reached the same result. Even when a taking is less than total, the state of the law at the time the owner acquired title is central to the examination of how the law affects the owner's reasonable investment-backed expectations. In other words, even if *Lucas*'s inherement test does not apply directly, the *Penn Central* test indirectly imports a similar inquiry. See *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153–54 (Fed. Cir. 1995) (applying the *Lucas* and *Penn Central* tests). For a good discussion of the distinction between the inherement test and the expectations test, see *Bowles v. United States*, 31 Fed. Cl. 37, 45–52 (1994) (discussing and contrasting the two tests) and discussion *infra* note 87.

In fact, the *Gazza* court did rely on *Penn Central* to some extent, noting that Gazza “had no reasonable investment-backed expectation that he could build a residence,” 679 N.E.2d at 1037, but did not cite *Penn Central* to support this statement. The court also noted later in the opinion that Gazza had no reasonable expectation that the government agency would act in a way in which it was not authorized to act. See *id.* at 1042 (citing *Penn Cent. Transp. Co.*, 438 U.S. 104). The *Anello* opinion relied more heavily on *Penn Central*'s discussion of reasonable investment-backed expectations. See *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 871–72 (N.Y. 1997); see also *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (concluding that “[i]f the investment-based expectation criterion ‘limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation. One who buys with knowledge of a restraint assumes the risk of economic loss,’” (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994))). See generally Paul Turner & Sam Kalen, *Takings and Beyond: Implications for Regulation*, 19 ENERGY L.J. 25, 62–66 (1998) (distinguishing between limitations that inhere in title and reasonable investment-backed expectations); *supra* note 76 (same); *infra* note 87 (same).

For a good examination of the breadth of the *Lucas* nuisance exception, see generally Lynn E. Blais, *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 S. CAL. L. REV. 1 (1996) (recognizing ambiguities in *Lucas* opinion and arguing that background principles of state property law should include statutes and not just common law). In a point that is particularly relevant here, Professor Blais observes that even if a court chooses not to consider pre-existing statutes when it examines inherent limitations on title, it still may examine those same statutes when looking into the broader question of whether an owner's reasonable investment-backed expectations have been impaired. See *id.* at 55–61; see also *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (rejecting a regulatory takings claim and observing that “[i]t is untenable for the Dodds to argue that they reasonably expected to build their retirement home in a Forest Use Zone without having to comply with Oregon state law at the time.”); Robert M. Washburn, “Reasonable Investment-Backed Expectations” as a Factor in Defining Property Interest, 49 WASH. U. J. URB. & CONTEMP. L. 63, 92–94 (1996) (discussing *Lucas* and its implications).

and use restriction before he acquired title means that he cannot argue that the land is as valuable after the enactment as it was before. Even if he subjectively held this expectation, it was not reasonable.⁷⁷ Thus, when he buys the property, he must insist upon a price discount that reflects the drop in value that the regulation has caused. After he demands this reduced price, any expectation on his part that the land can be developed later without restriction will not be backed by his actual investment, which already has factored in the drop in value that the restriction causes.⁷⁸ Not only does this buyer lack a reasonable investment-

⁷⁷ See Leigh & Burton, *supra* note 76, at 843 (noting that “[t]he operative word [in the phrase ‘reasonable investment-backed expectations’] is ‘reasonable’”). The authors observe:

Would an actor reasonably ignore existing zoning and subdivision code prohibitions, or the possibility of favorable or adverse zoning changes, or the future enactment of seriously adverse environmental restrictions? Such laws affect value because they modify the reasonable expectations of the actor in the marketplace with an impact equal to such important elements as location, availability of financing, and technical marketability of title.

Id. at 843–44 (footnotes omitted); see also *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1006–07 (1984) (holding that plaintiff “can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose [trade secret] data in a manner that was authorized by law at the time of the submission”); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994) (stating that “the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss”); *Good v. United States*, 39 Fed. Cl. 81, 114 (1997) (holding that “a consideration of expectations is central to the resolution of a regulatory takings claim where a restriction on land use is at issue. Plaintiff’s lack of such an expectation here is determinative of his takings claim”), *aff’d*, 189 F.3d 1355 (Fed. Cir. 1999); *M & J Coal Co. v. United States*, 30 Fed. Cl. 360, 368 (1994) (noting that “[s]ubjective evaluations of what the law requires, such as those held by plaintiffs, cannot form the basis for a legally cognizable right in a takings analysis. A contrary finding would place in the hands of the individual the power to create rights recognized by society”), *aff’d*, 47 F.3d 1148 (Fed. Cir. 1995).

⁷⁸ The Appellate Division had recognized this point in *Gazza*: “[H]ow can the petitioner reasonably claim that he expected to build a house on the subject lot, and that his reasonable expectations were frustrated by the respondent, when his own purchase price reflects a diminished value for the parcel?” *Gazza v. New York State Dep’t of Envtl. Conservation*, 634 N.Y.S.2d 740, 744 (N.Y. App. Div. 1995), *aff’d*, 679 N.E.2d 1035 (N.Y. 1997). “The petitioner, as a knowledgeable [sic] buyer, adjusted his purchase price to ‘offset’ the restrictions that he knew had been placed on the property.” *Id.* at 746 (citation omitted).

See also *Loveladies Harbor*, 28 F.3d at 1177 (stating that “the market had already discounted for the [effects of the pre-existing] restraint, so that a purchaser could not show a loss in his investment attributable to it”); *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704, 708 (1995) (noting that “[g]enerally, when an owner buys property with knowledge of restrictions upon the development of that property, he assumes the risk of any economic loss. The market has already discounted for the restraint” and concluding from this

backed expectation that the land may be used without restriction, he also cannot prove any financial loss.⁷⁹

The New York Court of Appeals reached this conclusion in *Gazza*, when it held that a party “cannot base a taking claim upon an interest he never owned,”⁸⁰ noting that an owner’s property interests “are defined by those State laws enacted

that “[a] party may not undertake a calculated business risk and then seek reimbursement from the Government when the party’s gamble does not result in its favor”); *Ciampitti v. United States*, 22 Cl. Ct. 310, 321 (1991) (holding, in case involving a post-enactment buyer, that “[t]o find that the Federal Government has taken a property interest in the form of a distinct, reasonable, investment-backed expectation, would, in this instance, turn the Government into an involuntary guarantor of Ciampitti’s gamble. This, the court declines to do”); *Board of Zoning Appeals v. Leisz*, 702 N.E.2d 1026, 1031 (Ind. 1998) (observing that “[a]ny investment-backed expectation [that post-enactment buyers] harbored out of ignorance of the ordinance is entitled to no weight. Indeed, whether they were aware of it or not, the price at which they bought the properties may have been, and in a perfect world was, a reflection of this risk”) (footnote omitted); William K. Jones, *Confiscation: A Rationale of the Law of Takings*, 24 HOFSTRA L. REV. 1, 41 (1995) (observing that “[l]and speculators by nature are not risk-averse. They gamble on the future, and sometimes they lose”); Washburn, *supra* note 76, at 69–70 (noting that “[a] landowner should not be heard to complain that land use or environmental regulations existing at the time of purchase constitute a taking on the basis of interference with investment-backed expectations”) (footnote omitted).

The owner actually may have paid more (or less) than the true value of the restricted land. This does not mean that the buyer is entitled to recover any difference between the price he paid and the amount the restricted land truly is worth. Rather, it reflects a miscalculation on the buyer’s part, which is to say that the seller negotiated a very good deal. The buyer’s loss turns out to be the seller’s gain. This miscalculation should have no impact on the municipal defendant, however, which is not obligated to compensate a buyer who invests poorly any more than it would be if the buyer overpaid after misjudging interest rates or the eventual sale price of the house to be built on the land. *See, e.g., Marks v. United States*, 34 Fed. Cl. 387, 411 (1995) (observing that “the taking clause in the Constitution should not be construed to provide reimbursement to investors for unrealized expectations, or for poor investment decisions”). Moreover, there is more likely to be a range of reasonable prices than a unique reasonable price.

A buyer’s apparent overpayment or underpayment also may reflect the parties’ negotiations as to such other matters as premiums for bearing greater risk and allocation of transaction costs. *See infra* note 150.

⁷⁹ If the post-enactment buyer knew of the land use restriction, then “the owner presumably paid a discounted price for the property. Compensating him for a ‘taking’ would confer a windfall.” *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994). If he paid what the land is worth subject to the regulation and no one has tested the effect of the regulation on the specific parcel of land, then he has undertaken a business risk. If he has calculated properly, then the permits and denials that he receives should balance out. If he has miscalculated, then the taxpayers should not be saddled with the responsibility of reimbursing him for the costs of his own errors. *See supra* note 78 (discussing miscalculations).

⁸⁰ *Gazza v. New York State Dep’t of Envtl. Conservation*, 679 N.E.2d 1035, 1040 (N.Y. 1997).

and in effect at the time he took title" to the property.⁸¹ The New York court somewhat confusingly based its holding upon *Lucas v. South Carolina Coastal Council*,⁸² a case in which the state deprived a property owner of substantially all economically viable use of his property; Gazza, in contrast, relinquished this argument when he conceded that his property still was worth \$80,000 even without a variance.⁸³ Had the court also examined Gazza's reasonable investment-backed expectations, as it should have, it would have had to reach the same result.⁸⁴ Gazza could not reasonably purchase the property without knowing the then-current state of the law, and the fact that he paid only \$100,000 for the lot suggests that he actually invested with the expectation that the wetlands law would sharply limit his use of the land.⁸⁵

The seller, of course, is in a far more sympathetic position. This person invested before the new law became effective and now finds that potential buyers are factoring in—indeed *must* factor in—the detrimental economic impact of this law. The remainder of this Section will contrast the post-enactment buyer's groundless case for compensation with the pre-enactment owner's stronger case and will illustrate how the seller's case might fare under a variety of different assumptions.

1. *The Post-Enactment Buyer's Case*

Consider once again a case in which an owner's land becomes subject to a restrictive new law or regulation. That owner then must sell the property at a disappointingly low price because any potential buyer factors in the new law's effects.⁸⁶ Has the government entity taken land for free? Not from the buyer, who had actual or constructive notice of all the information he needed to estimate what the land was worth at the time he bought it.⁸⁷

⁸¹ *Id.*; see also *Kim v. City of New York*, 681 N.E.2d 312, 315–16 (N.Y. 1997) (reaching similar conclusion); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 871 (N.Y. 1997) (same); *Basile v. Town of Southampton*, 678 N.E.2d 489, 490–91 (N.Y. 1997) (same).

⁸² 505 U.S. 1003 (1992).

⁸³ See *Gazza*, 679 N.E.2d at 1037 (discussing appraisal testimony).

⁸⁴ See *supra* notes 73–79 and accompanying text (discussing reasonable investment-backed expectations of post-enactment buyer); *supra* note 76 (distinguishing between inherent test and test that examines reasonable investment-backed expectations).

⁸⁵ Recall that Gazza's own appraiser opined that the lot would have been worth \$396,000 but for the restrictions. See *Gazza*, 679 N.E.2d at 1036.

⁸⁶ See, e.g., *Anello*, 678 N.E.2d at 871 (noting that "it is this prior owner who might suffer the potential loss because the purchase price of the property will very likely reflect any restrictions inhering in title").

⁸⁷ See, e.g., *M & J Coal Co. v. United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995) (stating

that "in analyzing a governmental action that allegedly interferes with an owner's land use, there can be no compensable interference if such land use was not permitted at the time the owner took title to the property"); *supra* notes 73–79 and accompanying text (discussing reasonable investment-backed expectations of post-enactment buyer).

The Court of Federal Claims had recognized this point in an earlier case, *Bowles v. United States*, 31 Fed. Cl. 37 (1994), even though the court held in favor of the owner of a residential lot whose application for a fill permit had been denied by the Army Corps of Engineers, rendering the vacant lot virtually unusable. The court offered two alternative analyses. In the first analysis, it relied on the inherent test and found that the facts established a total regulatory taking under *Lucas*. *See id.* at 46–49. In its second analysis, the court proceeded to state that it would have reached the same result under the reasonable investment-backed expectation test of *Penn Central*. In applying this second test, the court rejected the government's claim that the plaintiff was on notice of the permit requirement when he purchased the land, because of the court's belief that the Corps' jurisdiction over the property was not clear: "[A] reasonable investor would... have had no notice [of the permit requirement]. . . . Thus, Mr. Bowles' investment-backed expectations were reasonable and the facts of this case require just compensation . . ." *Id.* at 46. *See supra* note 76 (distinguishing between inherent test and test examining reasonable investment-backed expectations).

The court's alternative reasoning thus rested on its belief that a reasonable investor would have had no notice of the permit requirement. *See Bowles*, 31 Fed. Cl. at 46, 49–52. *Bowles* is unusual in this regard, for courts usually attribute knowledge of the law to property owners. *See, e.g.,* *Dodd v. Hood River County*, 136 F.3d 1219, 1230 (9th Cir. 1998) (holding that married couple could not have invested in timber property with reasonable investment-backed expectation that they could build their retirement home on it, in light of laws in place at time of their purchase); *Bowles*, 31 Fed. Cl. at 51 (noting that "[a] rational buyer who has actual notice of government land-use regulations prior to purchase will consider the risk that use may be restricted when deciding how much to pay. That is, the rational buyer is compensated for this risk up front by purchasing the property at a discount").

Courts have shown less certainty about how to decide cases involving predictable *future* changes in land use law. *Compare* *Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316, 1328 (D. Nev. 1992) (holding that buyers are not expected to know about or foresee future land use restrictions), *with* *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981) (denying takings claim and stating that owner "must have been aware that the standards and conditions governing the issuance of permits could change"). *See generally* WILLIAM A. FISCHER, *REGULATORY TAKINGS: LAW, ECONOMICS AND POLITICS* 195–97 (1995) (discussing whether property owners should be deemed to be on notice of future changes in law).

Joseph Gazza, a lawyer and developer with substantial real estate holdings in the area, made no comparable notice argument and could not have won under either prong of the *Bowles* analysis: He did not suffer a *Lucas*-type total taking, and he was aware of the restrictions on the land at the time he bought it. *See Gazza v. New York State Dep't of Envtl. Conservation*, 634 N.Y.S.2d 740, 741 (N.Y. App. Div. 1997) (noting that Gazza submitted variance application before purchasing property). For purposes of the hypothetical discussed in the text, assume that the reasonable investor would know whether the land he is purchasing is subject to a permitting requirement and will be deemed to have factored the uncertainties of this process into his offer. In other words, real cases are far more likely to resemble *Gazza* than *Bowles*.

Courts still are struggling with the related question of what to do when a buyer acquires

The buyer's calculation unavoidably will require some guesswork, both as to the likelihood of obtaining a permit and the value of the property if a permit is unavailable, but real estate investors engage in this type of guesswork all the time.⁸⁸ If the buyer estimates accurately, then he will pay about what the

land with knowledge of a pre-existing law that deprives the property of *all* economically viable use, a question the *Gazza* court had no need to address. *But see Anello*, 678 N.E.2d at 872–73 (Wesley, J., dissenting) (suggesting that Anello may have suffered deprivation of *Lucas*-type magnitude). The Supreme Court touched on this issue in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), when it stated, “Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner’s estate shows that the proscribed use interests were not part of his title to begin with.” *Id.* at 1027 (footnote omitted). Unfortunately, the Court was unclear as to what elements of state law should be considered in this logically antecedent inquiry, declaring at one point that both property and nuisance law are relevant while suggesting in the following sentence that only nuisance law matters. *See id.* at 1029.

Compare id. at 1029 (discussing limitations that “inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership”) *with id.* (referring to laws that “do no more than duplicate the result that could have been achieved in the courts . . . under the State’s law of private nuisance”). *See generally id.* at 1035 (Kennedy, J., concurring in the judgment) (stating that “reasonable expectations must be understood in light of the whole of our legal tradition. The common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society”); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177–79 (Fed. Cir. 1994) (summarizing *Lucas* as holding that owner establishes regulatory taking if there is denial of economically viable use of property; owner had distinct investment-backed expectations; and owner’s interest was vested under state property law and not within power of state to regulate under common law nuisance doctrine); JAN G. LAITOS, LAW OF PROPERTY RIGHTS PROTECTION: LIMITATIONS ON GOVERNMENTAL POWERS, § 9.03[C] (2000) (noting that “courts are somewhat split on this issue”); Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, in TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* 107, 111 & n.24 (David L. Callies ed., 1996) (recognizing circularity problems inherent in analysis while also noting that “well-established legislative limitations in place at the time of acquisition have a better claim for being included (and thus qualifying a landowner’s common law property bundle), especially if they reinforce or reasonably extend a common law nuisance limitation”); Blais, *supra* note 76, at 60–61 (concluding that one’s title is inherently limited by “objective indicia of property rights at the time title is taken” and noting that those objective indicia include common law, statutes, and regulatory schemes that prohibit certain land uses).

⁸⁸ In the *laissez-faire* world of property law, it seems reasonable to assume that a buyer with current or future development plans should be responsible for and capable of making these estimates. If his seller is less knowledgeable about the law and less skilled in these areas, she should seek advice from an attorney, a real estate agent, or some other knowledgeable professional. She will become aware of the problem when she asks the prospective buyer to justify an offer that will seem low to her, and she will know that it is time to consult with an expert. Any loss that she suffers from failing to take this step will result from a miscalculation

restricted property is worth and his payment will both reflect and define his reasonable investment-backed expectations.⁸⁹ Whether his permit gamble pays off in the end or not, he will have paid a fair price at the time for risky property, and this price will undercut any later argument by the buyer that the government has taken his property.⁹⁰ If the buyer estimates inaccurately and overpays for the property, that payment may reflect his investment-backed expectations, but they

on her part. This is a common enough error in the business world, but the government is not responsible for compensating owners who make this misstep. *See supra* note 78 (discussing miscalculations).

⁸⁹ For example, in *Myron v. City of Plymouth*, 562 N.W.2d 21 (Minn. Ct. App. 1997), the court observed that "appellant knew-at the time of purchase that the property was subject to a zoning restriction," that "appellant knew he was taking a 'gamble' when he purchased the property," and that "[t]he price presumably reflected the zoning restriction" before concluding that the appellant "may not now claim that the City has taken property rights from him without just compensation." *Id.* at 23-24; *see also* *Atlas Enters. Ltd. Partnership v. United States*, 32 Fed. Cl. 704 (1995); *see also* discussion *supra* note 78.

The buyer, who has actively and recently investigated the likelihood of being able to develop the property, often will be in a better position to evaluate these uncertainties than will the seller, who may simply have been warehousing the property for future development or sale.

Some sellers have little knowledge of the real estate business and may be attempting to avoid the difficult task of investigating and assessing these risks by selling the property for a fixed, if lower, amount. By selling the property, the seller is demonstrating clearly that she wishes to transfer the risks and uncertainties of development to someone who is skilled at evaluating these risks and is willing to take them, even though a sale against a background of legal uncertainty leads the seller to accept somewhat less for the property. *See infra* note 150 (discussing appropriate risk premiums in cases such as this).

The buyer, in turn, should attempt to learn about any past attempts by the seller to develop the property. In particular, the buyer should insist that the seller represent that she has made no such attempts or, if she has, to describe those attempts in detail. The buyer also should insist that any breach of these representations survive the closing of the transaction.

⁹⁰ For example, in *Robbins v. United States*, 40 Fed. Cl. 381 (1998), the plaintiffs "insist[ed] that the [Army Corps of Engineers'] wetlands determination and delineation interfered with their reasonable investment-backed expectations" and argued "that they reasonably could have expected that their land would have...value [comparable to neighboring property]." *Id.* at 386. The court was skeptical and questioned whether owners who acquired their land three years after the Clean Water Act became effective and who claimed to be unaware that 25 of their 39 acres constituted wetlands reasonably could have held these expectations. *See id.*

Contrast the plaintiffs' behavior in *Robbins* with that of the person to whom they later attempted to sell the land: "[H]aving been informed of the wetlands determination, and after receiving several estimates for the cost of site preparation and development, Mr. Baker demanded cancellation of the contract and a return of his deposit because 'the wetlands determination made the land unsuitable for [his] use.'" *Id.* at 383 (footnote omitted). Rather than doing their homework before closing, as Mr. Baker did, the Robbins's appeared to be asking the government to compensate them for their own due diligence lapses.

will not be reasonable. The government is under no constitutional command to reimburse a private investor for the costs of his own unreasonable judgment calls.⁹¹ The New York court reached this same conclusion in all four of its cases, giving no credence to the post-enactment purchasers' takings claims.⁹²

A disgruntled buyer in this situation, such as Joseph Gazza, is likely to refer

⁹¹ See, e.g., *Board of Supervisors v. Omni Homes, Inc.*, 481 S.E.2d 460, 465 (Va. 1997) (noting that "Omni's hope or optimism that it could secure the required access cannot transform a risk of development into an investment-backed expectation One who buys with knowledge of a restraint must assume the risk of economic loss") (citation omitted). By the same token, if the buyer underpays for the property, he gets a good deal at the seller's expense, and the government is not responsible for the seller's miscalculation. See *supra* note 78 (discussing miscalculations). Cf. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1004-05 (1984) (noting that it is owner's loss rather than sovereign's gain that determines whether there has been a taking); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) (same).

The government also is not obligated to continue to provide gratuitous benefits to privately owned land. See *Avenal v. United States*, 100 F.3d 933, 937-38 (Fed. Cir. 1997) (observing that plaintiffs cannot "claim surprise . . . that the pre-existing salinity conditions [favorable to oyster propagation], created at least in part by earlier government activity, were not left alone, but were again tampered with to their (this time) disadvantage" and concluding that plaintiffs' rights "were subject to the inevitable changes" that future government activity would cause).

⁹² See *supra* Part I (discussing *Gazza*); *supra* Part II.A (discussing *Anello*, *Basile*, and *Kim*).

While the post-enactment buyer should not receive takings compensation, he does retain the right to seek a variance or to challenge the application or the overall validity of the regulation. See, e.g., *Leonard v. Town of Brimfield*, 666 N.E.2d 1300, 1303 & n.3 (Mass. 1996) (distinguishing between suits challenging validity of regulations and suits seeking takings compensation); *Lopes v. City of Peabody*, 629 N.E.2d 1312, 1314 n.7, 1315 n.8 (Mass. 1994) (allowing post-enactment buyer to challenge validity of ordinance but avoiding discussion of whether that buyer also could bring takings claim, as latter question was not before it); *Myron v. City of Plymouth*, 562 N.W.2d 21, 24 (Minn. Ct. App. 1997) (allowing post-enactment buyer to seek variance while disallowing same buyer's takings claim); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 480 (N.Y. 1994) (upholding challenge to certain rent stabilization provisions brought by post-enactment buyers); *Spence v. Board of Zoning Appeals*, 496 S.E.2d 61, 63 (Va. 1998) (allowing post-enactment buyer to seek variance even though buyer had obtained property for reduced purchase price because previous owner's variance application had been denied).

Cf. *Twigg v. Town of Kennebunk*, 662 A.2d 914, 916 (Me. 1995) (finding that post-enactment buyer's knowledge of prior zoning restrictions is one factor in determining whether zoning variance should be granted); *Friedenburg v. New York State Dep't of Envtl. Conservation*, 658 N.Y.S.2d 643, 644 (N.Y. App. Div. 1997) (distinguishing between suits that claim government has taken property and suits that seek to annul administrative determinations as arbitrary and capricious). But see *Guy v. Brandon Township*, 450 N.W.2d 279, 281 (Mich. Ct. App. 1989) (allowing challenge to zoning ordinance and also remanding for calculation of temporary takings compensation). See generally *Eagle*, *supra* note 74, at 360-66 (discussing this issue).

the court to *Nollan v. California Coastal Commission*.⁹³ One of the questions the *Nollan* Court discussed in passing was whether property owners would be precluded from claiming compensation if they acquired their land with knowledge that the state previously had implemented a policy of conditioning the granting of building permits upon the owners' uncompensated dedication of a lateral access easement. The Court decided that this knowledge would not bar the owners' claim, observing, "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."⁹⁴

Nollan differs from a case like *Gazza* in one significant respect: *Nollan* was an exaction case. The Court held there that the state could not insist that the property owners give up some of their property rights in return for the government's issuing of a building permit unless the rights exacted from the owners substantially advance a legitimate state interest.⁹⁵ Specifically, the Court held that there must be an "essential nexus" between the government's condition and the end it seeks to further.⁹⁶ *Gazza*, in contrast, was not an exaction case. DEC did not offer *Gazza* a permit in return for his yielding of his property rights; rather, DEC denied the permit altogether, as state law allowed it to do.⁹⁷ The *Nollan* Court expressly held that if the state interests that the legislation aims to advance are legitimate, then "the [government] unquestionably would be able to

⁹³ 483 U.S. 825 (1987). In *Nollan*, the property owners wished to replace an existing beachfront bungalow with a much larger home. *See id.* at 827–28. The California Coastal Commission, concerned about the visual and psychological barrier to the ocean that the larger home would create, granted a permit to the Nollans on the condition that they allow persons already on the beach to pass laterally along their property. *See id.* at 828–29. The United States Supreme Court found that this condition constituted a taking. *See id.* at 841–42. The lateral access easement benefited only those persons already on the beach, while the Commission's concern was with people removed from the beach who might seek to reach it or see it. *See id.* at 832, 838–39. Thus, the condition that the government had imposed lacked an "essential nexus" with the problem that it sought to reduce. *See id.* at 834–37 (announcing and describing "essential nexus" standard).

⁹⁴ *Id.* at 834 n.2.

⁹⁵ *See id.* at 834–37.

⁹⁶ *Id.* at 837. The Court subsequently added a requirement that the magnitude of the property right exacted be "roughly proportional" to the scope of the problem that the exaction is designed to address. *See Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

⁹⁷ *See Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1036–37 (N.Y. 1997) (discussing denial of application); *see also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999) (confirming that analysis used in *Nollan* applies only to exaction cases); *Kim v. City of New York*, 681 N.E.2d 312, 316 n.3 (N.Y. 1997) (noting Court's holding in *Nollan* and distinguishing *Kim* from *Nollan* on grounds that *Nollan* did not involve pre-existing restriction on owner's use of property).

deny the [applicants] their permit outright if their [proposed construction] . . . would substantially impede these purposes"⁹⁸ The Court also would permit the government entity to grant the permit with certain conditions attached, even if those conditions otherwise would work a taking, as long as the conditions substantially advance the legitimate state interest. For example, the Court would have rejected the Nollans' claim if the Commission had issued the permit on the condition "that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."⁹⁹ Even a permanent physical occupation such as a viewing spot would not constitute a taking if the property right that is exacted is sufficiently related to the legitimate state interest that the government seeks to advance.¹⁰⁰

This distinction between *Gazza* and *Nollan* makes sense. A buyer such as

⁹⁸ *Nollan*, 483 U.S. at 835. The Court continued by noting that compensation would be due, however, if the denial "would interfere so drastically with the [applicants'] use of their property as to constitute a taking." *Id.* at 836. This language, which foreshadows *Lucas*'s "deprivation of all economically viable use" standard, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 & n.6 (1992) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)), does not apply to *Gazza*, as the New York court held that he had not been deprived of all economically viable use. *See Gazza*, 679 N.E.2d at 1041 (confirming that economic value of *Gazza*'s property was not extinguished). In fact, the New York court found that the lot, for which *Gazza* had paid \$100,000, retained a value of \$80,000. *See id.* at 1037. Very few claims are likely to meet the *Lucas* standard, particularly after *Lucas*.

⁹⁹ *Nollan*, 483 U.S. at 836.

¹⁰⁰ The Court continued:

Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

Id. at 836-37. This statement is particularly noteworthy in light of the Court's clear holding in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), that a permanent physical occupation in a non-exaction context is a taking per se.

Cf. Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) (en banc) (plurality opinion); discussion *supra* note 47. In *Preseault*, the court found a taking because the post-enactment buyers could not have foreseen that the federal government might transform a railway easement into a public hiking trail. *See id.* at 1550. In *Kim*, the only one of the New York cases that involved a physical occupation, the court found that the post-enactment buyers could have foreseen that their sunken lot might need to be filled to support an abutting roadway. *See Kim*, 681 N.E.2d at 315-16.

Gazza acquires property with knowledge that the government may legitimately deny a building permit altogether and cannot claim that the state has seized one of his property rights when it refuses to issue a permit. Gazza never owned an unimpeded right to build. *Nollan* presented an entirely different set of facts, as the Court emphasized. In *Nollan*, the government attempted to exact a property right that, in the Court's view, "utterly fail[ed] to further the end advanced as the justification for the prohibition."¹⁰¹ The complete absence of a cause and effect relationship between the property right that the government attempted to exact and the land use problem that it sought to address demonstrated that the government was acting erratically or unpredictably. The fact that prior applicants had agreed to this unconstitutional condition does not weaken the Nollans' case: Unconstitutional behavior does not become constitutional through repetition or acquiescence. Gazza knew when he bought the property that a permit denial was possible and allowable under New York's wetlands law—that is why he was able to obtain the lot for only \$100,000.¹⁰² Similarly, the Nollans could have foretold that a permit denial or even the exaction of a view easement were possible and allowable, and they could not have recovered in either of those events. But the government instead demanded an unrelated property interest, one that "utterly fails to further the [state's] end,"¹⁰³ and "if [California] wants an easement across the Nollans' property, it must pay for it."¹⁰⁴

¹⁰¹ *Nollan*, 483 U.S. at 837.

¹⁰² See *supra* notes 5–9 and accompanying text (discussing and justifying price of lot).

¹⁰³ *Nollan*, 483 U.S. at 837. The Court's holding in *Nollan* seems to have been that the Nollans win easily if they suffer a *Lucas*-type taking. See *supra* note 98. If they do not suffer a deprivation of this magnitude, then the Nollans prevail only if the permit condition lacks the required nexus to the problem the government seeks to address.

Now imagine these same two cases being brought by post-enactment buyers. The *Lucas*-type claim, involving a deprivation of all economically viable use, would stay with the pre-enactment owner, as I have just argued in the text. The law is intrusive enough that the buyer cannot claim surprise when the government applies it in a way that destroys the value of his property, and the parties will factor this devaluation into the price. If the taking arises from an unconstitutional exaction, however, the claim would belong to the post-enactment buyer, as the *Nollan* Court held. See *Nollan*, 483 U.S. at 837. The problem in an exaction case arises from the government's arbitrary and unconstrained exercise of its permitting discretion: The parties probably could not predict what conditions would attach to a permit and could not factor the likelihood and value of a permit into their sale price. This remains true even if the government has exercised its discretion in the same improper way in the past. Nothing prevents the government from changing its approach again in the future.

¹⁰⁴ *Id.* at 842. Justice Brennan, writing in dissent, pointed out that the California Coastal Commission had imposed similar requirements on all 43 coastal development projects in the vicinity since 1979. See *id.* at 858–60 (Brennan, J., dissenting). In his view, then, the Nollans could have predicted the Commission's demands. The Court addressed this point at length. See *id.* at 833 & n.2; see also *supra* note 103.

2. *The Pre-Enactment Owner's Case*

The original owner, who acquired the property before the regulation became effective, has a stronger and more sympathetic takings argument.¹⁰⁵ She

The parallel between *Gazza* and *Nollan* fails for a second reason. The Supreme Court's subsequent holding in *Lucas* states directly, "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) (footnote omitted). Thus, even if a property owner is deprived of all economically viable use of his property, he cannot recover if he never owned the right he believes to have been taken. *See Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (noting that "[t]he *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations of developing his land"); *supra* notes 76, 87 (discussing breadth of *Lucas* exception).

While *Lucas* discusses only the inherement test and not the reasonable investment-backed expectation test, one would expect that a regulation that deprives an owner of less than all economically viable use, such as the regulation in *Gazza*, will be no more likely to be found to constitute a taking than would a regulation that extinguishes the value of an owner's property. A court that wished to rely on the *Nollan* language to find a taking in a case such as *Gazza* thus would have to downplay the holding reached by a six-member majority of the Court in a 1992 takings case (*Lucas*) in favor of a footnote from a 1987 opinion (*Nollan*) joined by only five members of the Court. The New York Court of Appeals did not make this mistake. *See supra* notes 1–10 and accompanying text (discussing New York court's reasoning in *Gazza*).

This distinction between *Gazza* and *Nollan* also discredits the reasoning employed by the Court of Federal Claims in *Store Safe Redlands Associates v. United States*, 35 Fed. Cl. 726, 734–36 (1996). The court there supported its rejection of the notice defense by discussing three cases. One of these cases is *Nollan*, which the text of this Article has just shown to be factually distinguishable: *Nollan* applies only to exaction cases, and *Store Safe Redlands* was not an exaction case. *See also City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1635 (1999) (confirming that *Dolan* analysis applies only to exaction cases). The second case that the Court of Federal Claims cited, this time with disapproval, is *Bowles v. United States*, 31 Fed. Cl. 37 (1994). The court's contorted attempts to distance itself from this case, with which it disagreed, fail to mask the fact that *Bowles* should have controlled the result in *Store Safe Redlands*. *See supra* note 87 (discussing *Bowles*). The third case, *Gladstone v. Gregory*, 596 P.2d 491 (Nev. 1979), is a restrictive covenant case that has no bearing on takings law: Restrictive covenants are private voluntary agreements that, when properly drafted, executed, and recorded, bind successor owners.

¹⁰⁵ The Court of Federal Claims recognized this point in *M & J Coal Co. v. United States*, 30 Fed. Cl. 360 (1994), *aff'd*, 47 F.3d 1148 (Fed. Cir. 1995). *M & J* was prevented from mining certain coal due to the likelihood of subsidence of overlying residences, even though deeds to some of the mineral estates purported to give *M & J* the right to cause surface subsidence. *M & J* claimed that this coal had been taken. *See* 30 Fed. Cl. at 360 (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)). The court distinguished *Pennsylvania Coal* by noting that *M & J* had acquired its mineral rights several years after the enactment of

acquired property that was free of regulation and then saw its value drop after the new restriction became effective, as bidders factored in the economic effects of the new regulation and downgraded their offers accordingly.¹⁰⁶ The original

the federal law that allowed the Office of Surface Mining (OSM) to deny mining permits in certain cases in which subsidence was likely. "In contrast, the Kohler Act was passed more than forty years after the Pennsylvania Coal Company purchased its mining rights." *Id.* at 370 (citing *Pennsylvania Coal*, 260 U.S. at 413). As a result, "the application of the Kohler Act exacted rights that the Pennsylvania Coal Company had purchased; OSM's enforcement of [the newer federal law] did not have such an effect on plaintiffs." *Id.*

Cf. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1008 (1992) (noting that "[n]o portion of the lots . . . qualified as a 'critical area' . . . at the time Lucas acquired these parcels [in 1986]" and that "[Lucas's] intention with respect to the lots was to do what the owners of the immediately adjacent parcels had already done: erect single-family residences" but that "[t]he [1988] Beachfront Management Act brought Lucas's plans to an abrupt end"). *But see Andrus v. Allard*, 444 U.S. 51 (1979) (upholding regulations that prohibited commercial transactions in artifacts of protected bird species without regard to whether artifacts were taken before birds were protected by statute); *Ruppert v. Caffey*, 251 U.S. 264 (1920) (reaching similar conclusion in case involving severe restrictions on manufacture and sale of beer during World War I, including sale of beer manufactured before restrictions became effective); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (denying takings claim even though agency stiffened its regulatory requirements after owner acquired property). Thus, the fact that the law has changed since the owner acquired its property does not ensure that the owner will prevail.

¹⁰⁶ In *M & J Coal Co.*, then, the entity that sold the land to M & J might have had a valid claim after the restriction took effect and before it sold its mineral rights. The court did not have to address that question. *See supra* note 105 (discussing *M & J Coal Co.* and contrasting it with *Pennsylvania Coal*); *see also Pennsylvania Coal*, 260 U.S. at 412–14 (accepting argument that owner's property rights were constitutionally impaired by subsequently enacted law); *Bowles v. United States*, 31 Fed. Cl. 37, 51 (1994) (noting that "[w]hen the land owner has actual knowledge of the government regulation prior to purchase, the 'notice' defense makes economic sense. . . . [O]f course, the seller may have a valid taking claim"); STEVEN J. EAGLE, REGULATORY TAKINGS § 8-2(c), at 312 (1996 & Supp. 1999) (recognizing that rational purchasers consider regulatory risk and expressing concern about resulting losses suffered by their sellers); Blais, *supra* note 76, at 44 (noting that "[a] sudden change in the statutory land use restriction applicable to a parcel will be subject to a takings challenge by the existing owner. It is with respect to future owners that the land use restriction should be considered an inherent limitation on title"); William A. Fischel & Perry Shapiro, *Takings, Insurance, and Michelman: Comments on Economic Interpretations of "Just Compensation" Law*, 17 J. LEG. STUD. 269, 287–89 (1988) (observing that pre-enactment owners may suffer under rule capitalizing all expectations into value of property). *But see Andrus*, 444 U.S. at 67–68 (upholding regulations that prohibited commercial transactions in artifacts of protected bird species without regard to whether artifacts were taken before birds were protected by statute).

Of course, "there is no general constitutional right to be free from all changes in land-use laws," *New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084, 1090 (11th Cir. 1996), so the pre-enactment owner will have to show more than just this. *See supra* notes 76, 87 (discussing regulatory takings law in general).

owner has more extensive reasonable investment-backed expectations than her eventual buyer does, because she formed hers before the regulation became effective.¹⁰⁷ The property encompassed a more expansive bundle of rights and was more valuable when she acquired it than when she attempted to sell it,¹⁰⁸ holding all other variables constant.¹⁰⁹ The New York court had little reason to

¹⁰⁷ The Court of Appeals for the Federal Circuit recognized this point in a leading regulatory takings case, *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994). In finding that application of the federal Clean Water Act took the plaintiff's property, the court emphasized "that Loveladies purchased the property with the intent to develop it long before these particular state and federal regulatory programs came into effect." *Id.* at 1183. Because of this, Loveladies did not "have the opportunity to decide, at the beginning, whether its investment backed expectations could be realized under the regulatory environment the state later attempted to impose." *Id.*

The Federal Circuit modified its reasoning somewhat in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), when it ruled against a purchaser who was not subject to some of the specific regulations in question when he bought the property. The court observed:

Appellant's position is not entirely unreasonable, but we must ultimately reject it. In view of the regulatory climate that existed when Appellant acquired the property, Appellant could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land.

Id. at 1361–62. In other words, an owner can rely on the law in effect at the time that he acquired his property, as long as he anticipates predictable changes. *See also supra* note 104 (discussing Justice Brennan's similar argument in his *Nollan* dissent). *See generally* *Concrete Pipe & Prods. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645–46 (1993) (noting that those who voluntarily enter regulated fields must anticipate modifications to the legislative scheme); *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 226–27 (1986) (same); *MELTZ ET AL.*, *supra* note 44, at 27 (observing that, after *Lucas*, post-enactment buyers may have less expansive property rights than pre-enactment owners have). *But see* *Eastern Enters. v. Apfel*, 524 U.S. 498, 528–29 (1998) (plurality opinion) (finding legislation unconstitutional because it "imposes severe retroactive liability on a limited class of parties that could not have anticipated the liability, and the extent of that liability is substantially disproportionate to the parties' experience").

¹⁰⁸ In fact, neighbors who own seemingly identical lots actually may possess quite different bundles of rights because they acquired their lots at different times under different regulatory regimes.

¹⁰⁹ In raw dollars, the property may be worth more now, subject to the restriction, than it was at the time she acquired it, particularly if she has held the property for a long time. This single fact will not always resolve the issue. The questions the court should be examining are whether the investment-backed expectations she might reasonably have formed at the time she acquired the property have been impaired by the subsequent change in the law and whether that impairment rises to the level of a constitutional violation. However, the mere fact that the property has increased in value often will harm the owner's case. *See, e.g., Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1367 (Fed. Cir. 1999) (noting that takings plaintiff more than tripled its money in 11 years and concluding that "[t]hat result itself undermines Forest's

address these arguments of the pre-enactment owner because all of its plaintiffs were post-enactment buyers.¹¹⁰

The analysis is complicated further because the regulation does not work a taking on its face and the owner has not determined the effects of the regulation on her property. If the new restriction had worked a taking on its face, then the owner's state law facial claim would have ripened when the change became effective and she would have had the right to bring her takings claim in state court from that time until the statute of limitations expired.¹¹¹ If the owner had had a reasonable permit application denied, then her state law as-applied claim would have ripened at the time of the denial and she again would have had the right from that time until the statute of limitations expired to bring her state

contention that its property was taken"); *Deltona Corp. v. United States*, 657 F.2d 1184, 1192 (Ct. Cl. 1981) (noting that, even after factoring in effect of permit denial, land had more than doubled in value); *Good v. United States*, 39 Fed. Cl. 81, 112–13 (1997) (stating that "[i]n a case where a developer could recoup his initial investment in the property, but nonetheless chooses to continue to invest in development in the face of significant regulatory limitations, no reasonable expectations are upset when development is restricted or proscribed"), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *Leigh & Burton*, *supra* note 76, at 852–54, 857 (discussing appropriate baseline for calculating reasonable investment-backed expectations).

But cf. *Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316, 1320–22 (D. Nev. 1992) (noting that fact that landowner sells land at profit does not undercut claim for previously completed temporary taking); *Alegria v. Keeney*, 687 A.2d 1249, 1253 (R.I. 1997) (observing that even if post-enactment buyer has negative or unexpectedly low return on initial investment, property has not necessarily been deprived of all economically viable use for purposes of categorical takings analysis).

Courts also need to be attuned to the fact that some of the value upon which the owner is relying may result from benefits that the government provided gratuitously. *See, e.g., Avenal v. United States*, 100 F.3d 933, 937 (Fed. Cir. 1997). These increments of value ordinarily will not merit compensation. *See generally infra* note 156 (discussing valuation).

¹¹⁰ *See Gazza*, 679 N.E.2d at 1040–41 (observing that *Gazza*, who bought his property after law changed, could not "base a taking claim upon an interest he never owned. The relevant property interests owned by the petitioner are defined by those State laws enacted and in effect at the time he took title and they are not dependent on the timing of State action pursuant to such laws") (footnote omitted); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 871 (N.Y. 1997) (noting that court's rule "should furnish ample incentive to the prior owner—the party whose title has been redefined by the promulgation of a new regulation—to assert whatever compensatory takings claim it might have"); *Basile v. Town of Southampton*, 678 N.E.2d 489, 490–91 (N.Y. 1997) (noting that "[w]hatever taking claim the prior landowner may have had against the environmental regulation of the subject parcel, any property interest that might serve as the foundation for such a claim was not owned by claimant here who took title after the redefinition of the relevant property interests"); *Eagle*, *supra* note 74, at 367–73 (discussing *Anello* in detail).

¹¹¹ *See supra* Part III.A (discussing this law and arguing that claim can be conveyed after it has ripened).

takings claim in state court.¹¹² Here, however, the government merely has initiated a process that ultimately may give the owner a ripe as-applied takings claim, a claim that actually will ripen or not depending upon the ongoing actions of the owner and the government. The post-enactment buyer's reasonable investment-backed expectations are insufficient to support a takings case, while the pre-enactment owner's more expansive expectations will not ripen into a viable takings claim until she tests the effects of the law upon her land.¹¹³ But what if this original owner would rather sell her land than use it herself?

3. *The Core Problem and a Suggested Analysis*

This last question brings us to the central issues that this Article will confront: If the post-enactment buyer cannot bring a takings claim and the original owner sells the property without ripening her "green" claim, can the government take land for free? And if it cannot, then who gets the takings claim?

The answer, I suggest, is that the seller's as-applied takings claim ripens immediately. By severing her legal relationship to the property, the seller crystallizes her loss and takes the final step in demonstrating the effect of the new regulation upon her property rights, just as she might have done by pursuing a permit application to an unsuccessful completion.¹¹⁴ The seller now can quantify the effect of the regulation upon her just-ended relationship with the property, her as-applied claim is ripe under state law, and the statute of limitations begins to run.

The claim the seller possesses will be an odd sort of regulatory takings claim and will differ from the more common claim that she might have brought after a permit denial, but it will be ripe at the state level. The final decision that federal law requires will arise not from the workings of the local government's administrative process but rather from the seller's conveyance of the property to the buyer. Now the seller will know just how the regulation has damaged her, and the court will be able to assess whether the effect of the new regulation—a decrease in the seller's sale price—amounts to a taking of her property without

¹¹² See *supra* Part III.B (discussing this law and arguing that claim can be conveyed after it has ripened).

¹¹³ If her claim were ripe under settled takings law, she would be in a position to determine precisely what uses remain and to estimate the current value of the regulated property. This information is critical in a regulatory takings case, in which the court must decide whether there has been a deprivation of all economically viable use and, if not, whether the diminution in value nonetheless exceeds constitutional limitations. See *supra* notes 76, 87 (summarizing categorical rules and balancing tests employed in regulatory takings cases).

¹¹⁴ If the seller had succeeded in obtaining a permit, there would be no taking and she would have no cause to bring a takings claim.

just compensation. This Article will refer to this new type of takings claim as a "sale-ripened" claim, a designation that may be a trifle too narrow but that underscores the distinction between these claims and the more traditional "denial-ripened" claims that courts already recognize.¹¹⁵

By transferring the property without seeking a permit, the seller changes the nature, the certainty, the magnitude, and the timing of her claim, transforming the possibility of a large loss in the future into a certain but smaller loss now. Had she retained the property and attempted to develop it herself, she would not have known how the administrative process would turn out until it had run its course. In some cases, she would receive her permit and suffer no loss. In other cases, she would negotiate with the permitting authorities, agree to a more

¹¹⁵ For example, a gift might ripen this claim in just the way that a sale does. *See infra* note 194. Moreover, the sale not only ripens the claim but also changes its substantive nature. *See infra* text following note 115.

The analysis that I recommend here is distinguishable from the one that the Eleventh Circuit rejected in *New Port Largo, Inc. v. Monroe County*, 985 F.2d 1488 (11th Cir. 1993) (per curiam). In *New Port Largo*, the pre-enactment owner sold the property after a new zoning law became effective but before the Florida courts determined that the zoning was invalid, and this original owner continued to pursue its takings claim after the sale. *See id.* at 1490–91. The County argued in federal court that the sale date was the date on which the owner's claim for compensation accrued and that the claim therefore was time-barred, while the owner argued that its compensation claim did not accrue until the state court invalidated the ordinance more than three years after the sale. *See id.* at 1494. The Eleventh Circuit agreed with the landowner, holding "that the state's invalidation of the zoning ordinance, not NPL's sale of the property, determines . . . the accrual date of NPL's action." *Id.* Cf. *Pennell v. City of San Jose*, 485 U.S. 1, 8 n.4 (1988) (declining to address this issue).

The takings claim that the Eleventh Circuit was discussing was a traditional denial-ripened claim, arising out of the state court's ultimate invalidation of the zoning ordinance. If the facts of an as-applied claim already have finished developing before the sale, then the argument that the Eleventh Circuit accepted parallels one of my earlier recommendations. *See supra* Part III.B. If the facts of an as-applied claim are continuing to develop even after the sale, then the argument that the Eleventh Circuit accepted requires a degree of cooperation between the original owner and its successor that may be unreasonable to expect in most cases. *See infra* Part III.F (highlighting this problem). The method of analysis that I am recommending in this Part differs from both of these approaches, and would create a new type of takings claim in which the sale of the property under conditions of legal uncertainty is the final act that ripens the original owner's claim. The Eleventh Circuit had no reason to consider this method of analysis.

Note that the Eleventh Circuit ultimately rejected *New Port Largo's* takings claim on the merits. *See New Port Largo, Inc. v. Monroe County*, 95 F.3d 1084 (11th Cir. 1996). The court, after the first claim was remanded and then appealed, declined to consider the impact of the owner's intervening sale of the property as part of its "business divorce," noting that "[p]erhaps the sale of the property could have shortened the takings period for NPL (and so reduced NPL's potential damages), but we need not address this issue because we conclude that as a matter of law there was no violation of the Fifth Amendment." *Id.* at 1090 n.7.

modest development, and avoid the need to litigate. In some fraction of the cases, her application would be denied, she would suffer a large loss, and she next would face the difficult task of proving to a state arbiter that this certain and sizable loss crossed the constitutional barrier.

Everything changes if the original owner sells the property before pursuing the permitting process to its conclusion. Instead of gambling, the seller agrees to liquidate her loss, selling the property for less than if the restriction had not limited her use of the property but more than if she had known that she would receive neither a permit nor compensation. The seller accepts a certain but smaller diminution in value. In effect, the buyer insures her against a catastrophic loss.¹¹⁶

If the seller were to bring a sale-ripened takings claim under the approach recommended here, that claim would arise from the sale of the property for a fixed and certain loss rather than arising from a final permit denial.¹¹⁷ This

¹¹⁶ While Judge Wesley's concern that pre-enactment owners "cannot transfer the [newly restricted] property to someone else without destroying the property's value," *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 873 (N.Y. 1997) (Wesley, J., dissenting), is somewhat overstated, my proposal addresses it. The judge's concern is overstated because it overlooks the fact that the existence of a taking is less certain at the time of the sale than it is at the later time when the permit is denied. In other words, the buyer helps the seller to hedge her bet. To illustrate, if the application of the new law would diminish the property's value by 40% but there is a 50% chance that the owner will receive a variance, then the total diminution in value at the time of the sale, considering both the likelihood and significance of a variance denial, is only 20%. The risk-averse seller liquidates her loss at 20% rather than making an even money bet on a 40% loss. My proposal then would allow the seller to bring a claim arguing that her property has been taken, based on this 20% diminution in value. If her claim fails, then she has lost less than she would have had she retained the property and unsuccessfully tested the regulation herself. Meanwhile, the buyer bears all of the risks of the permitting process. *Cf. Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316, 1322 (D. Nev. 1992) (noting possibility that owner can "take 'a double dip' from the public till" by selling property for fair market value and then seeking takings compensation, without discussing what "fair market value" means under those circumstances).

¹¹⁷ The timing of the alleged taking will be important to the outcome. *See FISCHEL, supra* note 87, at 193–95. However, Professor Fischel assumes that a prospective buyer will demand and receive full credit for the greatest possible diminution in value when he purchases the land under conditions of uncertainty. *See id.* at 193–94 (offering example in which buyer receives full credit for drop in value that regulation will cause even though regulation only is under consideration and has not yet been adopted). This assumption overstates the total loss that buyers and sellers collectively suffer, because the government sometimes will grant a permit to the buyer. This Article recognizes that the buyer suffers no economic loss at all, because he can factor the likelihood of receiving a permit into the purchase price. He buys a risky asset at a price that should reflect its risks. The loss that the seller suffers is far more complex and may or may not be compensable, as the remainder of this Article demonstrates.

In *Carpenter*, the court worried that a landowner could "make unripeness go away by

transformation occasionally may appear to work to the benefit of the government defendant. A court that applies the Supreme Court's case law will be searching for deprivations of all economically viable use of the property or impairments of the owner's reasonable investment-backed expectations¹¹⁸ and may be less inclined to find a taking if the owner has reduced the magnitude of her loss by selling her property without testing the limits of the land use regulation. Complicating matters still further and offsetting this apparent substantive benefit to the government is the fact that the pre-enactment owner can bring a sale-ripened claim under this Article's proposal much sooner than she can bring a denial-ripened claim under current takings law. Rather than seeing her claim postponed until she receives a final decision, assuming that she can even survive

selling her property for a profit and then arguing that it is no longer possible for her to ripen the claim. . . . [E]very owner could sell his or her property, convert an unripe claim into a ripe one, and sue TRPA. This is not good law." *Carpenter*, 804 F. Supp. at 1325 n.14. The fact that a sale-ripened takings claim differs from the more traditional denial-ripened as-applied takings claim solves this problem for two related reasons. First, the quicker ripening will be offset by a reduced economic loss, and sellers who get to court earlier typically will have claims that are substantively weaker and that seek smaller amounts of compensation. *See supra* notes 115–16 and accompanying text (discussing tradeoff between quicker ripening and weaker substantive claims); *infra* Part III.D (addressing extent to which claim truly is weaker). While each landowner will have to decide for herself whether she fares any better by bringing a sale-ripened claim, landowners as a group should be no better off and will have little incentive to sell their property prematurely. *See infra* Part III.D (discussing outcome neutrality of my proposed approach). Second, a sale-ripened claim is an effective alternative only if the property owner can locate a buyer who is willing to acquire this risky property. These buyers are likely to exist but are certain to factor the risks of acquiring untested property into the purchase price and also to charge the seller a premium for assuming these risks. *See infra* notes 150–52 and accompanying text (discussing calculation of likelihood of receiving permit). An owner who attempts to "make unripeness go away" will not be able to do so inexpensively and will receive in return an uncertain takings claim.

Carpenter is an odd case because the State of Nevada purchased the land under a program in which it acquired environmentally sensitive property in the Lake Tahoe area. *See id.* at 1320. Moreover, the fact that the seller might sell her property at a profit is not determinative; the pertinent questions are whether she has suffered a deprivation of all economically viable use or an impairment of her reasonable investment-backed expectations. It is at least theoretically possible that an owner could sell her land at a profit and still suffer a taking. *See supra* note 109 and accompanying text.

Courts have shown a reluctance to allow parties to assign claims to other parties. This reluctance is evident in judicial decisions, *see supra* notes 51–54 and accompanying text (discussing cases in which only owner at time of taking could recover compensation), and also is reflected in statutory law, *see supra* note 62 (discussing Assignment of Claims Act). The proposal offered here accommodates that concern by ensuring that any takings claim remains in the hands of the original landowner.

¹¹⁸ *See supra* notes 76, 87 (discussing categorical and balancing tests that courts apply in regulatory takings cases).

the process that long, the original owner can bring her claim as soon as she sells her property.

One of this Article's chief concerns is that landowners who choose to sell their property untested be treated no better or worse than landowners who decide to test a land use law themselves. The analysis proposed here, however, changes the factual nature of the original owner's takings claim and the time at which she can bring it and thus risks treating pre-enactment owners differently if they decide to sell their land. It is difficult to generalize about outcomes without focusing more closely on the likelihood of receiving a permit, the diminution in value if the permit is denied, and the residual value of the property if the permit is denied. The next Section undertakes this examination and demonstrates that owners who choose to sell their property without testing the effects of a new land use restriction will bear only a slight risk of impairing their likelihood of prevailing and that the parties to the sale can eliminate this risk almost entirely if they plan their transaction carefully.

D. Recognition of Sale-Ripened Takings Claims Is Outcome Neutral

The previous Section examined the predicament of persons who purchase land that is not subject to restrictions and then seek to sell their land after it becomes subject to land use controls. If these owners have not ripened their as-applied claims by pursuing a permit application to completion, they run the risk under current law of forfeiting their claims if they sell their property.¹¹⁹ Meanwhile, their buyers cannot bring takings claims because they purchased the property after these restrictions became effective and have already factored these limitations into their expectations and their purchase price. Thus, the mere presence of a sale could cause one party—most likely the seller—to lose a claim that otherwise might have succeeded. Viewed more cynically, the happenstance of a sale might let the government off the hook for the payment of takings compensation simply because the owner chose to sell her property rather than embarking on the long and unpleasant process of pursuing a permit.

I recommended in the previous Section that the pre-enactment owner who chooses to sell her property to a post-enactment buyer should be seen as ripening her state law claim by the very act of selling the land. The fact that she must sell her property subject to the new law causes her to lose something, and the sale of the property at a reduced price allows a court to figure out the nature and value of what she has lost. This pre-enactment owner ripens her claim and demonstrates the effect of the law on her land by selling the land rather than by pursuing a

¹¹⁹ The four New York cases discussed in Part II, *supra*, expressly left this issue open, but clearly recognized that there was at least some risk that a pre-enactment owner who sells her property might lose an otherwise viable takings claim. See *supra* note 110.

permit, and the court now will be in a position to assess whether the regulation has violated her constitutional property rights.

While there are many reasons why a court might want to take a fresh look at substantive takings law, it is not my purpose here to argue for any changes in that law. Rather, I am attempting to resolve a separate and severable problem in a way that does not tip the substantive balance one way or the other. If the government has taken property, then it should pay, whether the owner sells her property or retains it. If the government has not taken property, then it should not have to pay, no matter when title to the property is transferred. The fact that the property changes hands should neither increase nor decrease any party's chances of recovering from the government that has restricted its use.¹²⁰

But is my approach truly outcome neutral? Is a seller who brings a claim arising from a post-enactment sale in approximately the same situation as an owner who brings a claim after unsuccessfully applying for a permit? This Section will examine these questions and will conclude that the answer generally is "yes." In a limited number of circumstances, the pre-enactment owner may place herself in a somewhat less favorable position by selling her property, but these circumstances ordinarily will be predictable in advance and the seller can plan her transaction in a way that minimizes this risk. In short, the proposed analysis meets its goals most of the time and permits the seller to plan for those few situations in which it may not.

1. Minimal Impact on the Property if the Permit Is Denied

First, consider those cases in which a land use restriction will have, at most, a fairly negligible economic impact on the value of property. The permitting body may or may not grant the owner's application request, but even if it does not, the diminution in value will be slight. In cases such as this, the recognition of sale-ripened takings claims will be outcome neutral.

If the original owner were to apply for a permit herself and be rejected, the slight drop in value would be unlikely to disappoint her reasonable investment-backed expectations to any significant degree, and her regulatory takings claim

¹²⁰ Those who object to the present state of takings law are likely to have the same objections to the analysis proposed here, and this Article makes no attempt either to criticize or to defend current takings law. Instead, my aim here is to demonstrate that judicial recognition of sale-ripened takings claims would allow a pre-enactment owner to sell her property after a new regulation takes effect, without forfeiting or damaging a constitutional case that she otherwise might have brought and possibly won. The use of this approach thus would squarely rebut any concerns that government entities can change land use laws and then escape takings liability if pre-enactment owners sell their property before attempting to develop it. *See supra* notes 34–36 and accompanying text. The illustrations that follow should demonstrate whether this proposal achieves that goal.

would fail.¹²¹ If, instead, she were to sell her property, she would accept a price that is below the value of the property before the regulation became effective but higher than the value if a permit had finally been denied.¹²² Under the test recommended here, this would ripen her claim, and she now would argue that this drop in her sale price constitutes a taking. This diminution in value, however, would be somewhat smaller than the price drop she would experience if she applied for a permit herself and was rejected, so her sale-ripened claim would be even more likely to fail than her denial-ripened claim would have been.¹²³ In a case such as this, the government simply has not taken property, and the original owner's claim must fail whether she applies for a permit unsuccessfully or sells the property without seeking a permit. The government has regulated property within its permitted range, the owner has suffered a slight drop in value, and any takings claim will not succeed.

2. Significant Impact on the Property if the Permit Is Denied with a High Likelihood That the Government Will Grant the Permit

Now consider those cases in which the diminution in value that would result from a permit denial is significant enough that a court might consider awarding compensation to a landowner whose application is rejected. Within this category of cases, the likelihood that the government will award the requested permit

¹²¹ In much of this discussion, I will assume that the court will apply the test that examines impairment of reasonable investment-backed expectations. *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 127 (1978) (discussing this test). In fact, the Court has applied a number of different balancing tests in regulatory takings cases. *See supra* notes 76, 87 (discussing various balancing tests applied in regulatory takings cases). What matters here is that, whichever test a court chooses to apply, the owner whose permit is denied suffers only a slight injury, one that falls well below the constitutional threshold. If the owner whose permit application is denied cannot recover, then the owner whose claim results from a sale of the property at an intermediate price certainly cannot prevail, as her case is even weaker. *See infra* note 122 and accompanying text (discussing fact that this price will be an intermediate price).

¹²² If her application for a permit is rejected, then the pre-enactment owner bears the full economic brunt of this regulation. If instead she sells the property in its untested state, then she suffers a lesser loss. This is true because the buyer's offer will factor in the possibility that he will be able to obtain a permit. If a denial will diminish the property's value by \$100,000, but the permitting authority grants 90% of all similar permits, the buyer will demand only a \$10,000 discount. *See generally infra* Part III.E (illustrating calculation in more detail in hypothetical case involving Gazza and person from whom he acquired his land).

¹²³ In fact, the land may sell for slightly less than this amount, for two distinct reasons. First, the buyer is serving as an insurer and is entitled to be paid for this service. He is purchasing not only the land but also the risk, and the seller must pay the buyer a premium to assume this burden. Second, the buyer now must bear the transaction costs of seeking a permit. *See infra* note 150 (discussing both of these reasons).

proves to be critical to the analysis. First, imagine the case in which the diminution in value will be significant but there is a high likelihood that the government will grant the permit.

If the original owner retains the property and applies for a permit, one of two things will happen.¹²⁴ Most often, she will receive her permit, which means that after a drop in value during the permitting process caused by the uncertainty of the outcome, the property will return to its original worth.¹²⁵ Infrequently, the government entity will deny her permit application, thereby causing an enormous and lasting drop in the value of the property. In this latter case, the owner now will have a denial-ripened takings claim that stands a reasonable chance of succeeding because of the significant impact of the government's action. If the owner receives her permit, then she breaks even. If her permit application is rejected, then there is a decent possibility that she will break even after the dust settles and her takings claim is resolved.¹²⁶

¹²⁴ This is an oversimplification, of course, as a range of possible outcomes can result. In many cases, the parties will negotiate an intermediate settlement, in which the landowner receives a permit for a more limited development and no further litigation results. *See supra* note 75 (discussing this range of outcomes).

If anything, the failure of the hypotheticals in this Part to account for intermediate, negotiated solutions will understate the effectiveness of the model I have proposed in this Article. The illustrations in this Part portray the most extreme cases, and in some of those cases a landowner may recover compensation. The intermediate cases that these illustrations gloss over, in contrast, are those in which the facts are balanced enough that the parties are willing to agree to a settlement that avoids the need for litigation. Since only the most extreme sets of facts lead to takings compensation, the mid-range cases that these illustrations ignore would be unlikely to lead to takings compensation with any regularity.

¹²⁵ When the ability to develop the property is in question, its value drops somewhat, to reflect this uncertainty. Once this uncertainty has resolved itself into a definite prohibition, then the property value will drop even more, as the speculative value of the right to apply for that permit proves to be zero.

In fact, if property becomes subject to regulation and the owner then obtains a permit, the property might be worth more than it originally was. For one thing, under this new regime, property with a permit is a rarer commodity. In addition, buyers will be willing to compensate the owner who has endured the delay, expense, and aggravation of pursuing a permit.

¹²⁶ Of course, no takings claim is a sure thing, and the disappointed landowner could pursue a strong claim for years and ultimately lose. My principal point in this subsection is that the pre-enactment owner's chance of losing in the long run will be somewhat greater if she sells the property untested and brings a sale-ripened claim than it would be if she were to test the property herself, fail to receive a permit, and then bring a denial-ripened takings claim.

Recall that a significant diminution in value does not guarantee that a court will find a regulation to be a taking. *See supra* note 76 (distinguishing between deprivations of all economically viable use and impairments of reasonable investment-backed expectations). If the regulation deprives property of all economically viable use, then it works a taking. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If the regulation deprives property of

Now contrast what happens if this owner instead were to sell her property without pursuing the permitting process. A prospective buyer will offer less for property that has just become subject to this new restriction than he would have offered if the property's use were not limited by the new rule. The discount will be equal to the diminution in value that a denied application will cause multiplied by the likelihood that the government will deny the permit.¹²⁷ On these hypothetical facts, the potential diminution in value is quite large, but the application is highly unlikely to be denied. As a result, the product of these two numbers will be more modest, and the price discount under these uncertain conditions will be significantly smaller than it would be following a final permit denial.¹²⁸ In accordance with this Article's proposal, the original owner's sale of the property would ripen her takings claim. Her diminution in value here would be relatively small, however, because the drop in the sale price factors in the strong likelihood that she will receive her permit. The loss that she suffers if she sells the property before receiving a final decision is a moderate one, and her

less than all economically viable use, then a court will apply one of several balancing tests, many of which are summarized in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In particular, a court will look at "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." *Id.* at 124.

While a steep drop in value is not enough to ensure that a court will find a taking, *see id.* at 131 (discussing cases in which Court failed to find taking despite large diminutions in value), it is a significant factor in a court's analysis of the extent to which an owner's expectations have been impaired, *see Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922) (noting that "[o]ne fact for consideration in determining [the] limits [of the police power] is the extent of the diminution"), and the extent to which economically viable uses remain, *see Florida Rock Indus. v. United States*, 791 F.2d 893, 901-03 (Fed. Cir. 1986) (recognizing that even speculative uses may be economically viable). That is particularly true in cases like *Lucas* or *Gazza*, in which the land was vacant property in a residential area bought with the clear intention of erecting houses. *Cf. Penn Cent. Transp. Co.*, 438 U.S. at 136 (noting that Grand Central Terminal's "designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions"). Thus, even if *Lucas* had not suffered a deprivation of all economically viable use, he still might have suffered a taking under the more difficult *Penn Central* test. *Gazza*, as a post-enactment buyer, cannot make the same argument, *see supra* notes 80-85 and accompanying text, although his seller might be able to, *see supra* notes 105-13 and accompanying text.

¹²⁷ Again, the prospective purchaser is more likely to employ a "weighted average" approach. *See supra* note 75.

¹²⁸ In this case, there is a slight chance of an enormous loss, which may be exactly the situation in which the risk-averse seller will most want insurance. If this is so, then the risk premium should be somewhat higher than it otherwise would be. *See infra* note 150 (discussing risk premiums).

claim is likely to fail on the merits even though she can bring this sale-ripened claim relatively quickly.

This example suggests that judicial endorsement of sale-ripened takings claims will not be outcome neutral in cases in which the permit is likely to issue but the consequences of a denial are significant. Had the owner sold the property after a permit denial, she would have had a strong takings claim, but by selling the property in its untested state, she liquidates her loss at a much lower amount and reduces significantly the chance that her takings claim will succeed. To illustrate the point even more vividly, imagine that this owner owns a portfolio of several similar properties. If she applies for permits for all of them, she will receive most of these permits and might retain a viable denial-ripened takings claim on the one or two others. However, if she sells the properties before applying for a permit, she will liquidate her loss on each property at an amount that is unlikely to qualify as a sale-ripened taking of any one of them. Viewed from the government's perspective, denying a permit to a pre-enactment owner might lead a court to award compensation to that owner, but denying a permit to a post-enactment buyer will not lead the court to award compensation to anyone. Thus, adoption of the approach urged above might lead the government to overregulate: It can grant permits or pay compensation to pre-enactment owners while hoping that some of these owners will sell their land prematurely and thereby sacrifice their claims.¹²⁹

¹²⁹ Even if only one owner gives up an otherwise viable claim, the government body still may believe that it is better off by acting in this way. The government body that is calculating the potential costs of a new regulation probably will assume that some owners will act foolishly. This knowledge may occasionally tip the scales in favor of a regulation that is economically undesirable, because the government knows that part of the true cost will be borne by some misguided pre-enactment owners. In other words, the government sometimes may enact a land use restriction with costs that exceed its benefits if the government suspects that someone other than itself will bear some of those costs. The government is concerned with ensuring that the costs to *it* will not exceed the benefits to *it*.

This possible advantage to the regulatory entity is offset by countervailing drawbacks. *See supra* note 118 and accompanying text (discussing these drawbacks); *infra* note 144 and accompanying text (concluding that it will be difficult for parties to predict whether benefits to government outweigh drawbacks).

Government entities, like private litigants, also run the risk of reaching inconsistent results in separate lawsuits involving different parties. A somewhat worrisome possibility is that the government will end up paying takings compensation to the pre-enactment owner who brings a sale-ripened claim and then will be forced to grant a rezoning or other similar relief to the post-enactment buyer. *See supra* note 92 (discussing possibility that post-enactment buyer, though ineligible for takings compensation, nonetheless may seek variance or challenge application or overall validity of regulation). The post-enactment buyer gets both a partial price discount and a permit; the pre-enactment owner receives a partial price "premium," for selling the property without ever receiving a firm denial, and also collects compensation; and the government

This problem turns out to be more minor than it appears. A property owner and her prospective buyer are likely to analyze the likelihood that a permit will be available and the impact of a denial—in fact, they are expected to do so.¹³⁰ If a prospective seller fears that her application is likely to be granted but that the impact of a denial will be devastating, then she has a variety of options available to her,¹³¹ as the New York Court of Appeals recognized in *Anello*.¹³² The seller might decide to pursue the permit herself. She might agree to a conditional sales contract under which the buyer is not required to close unless and until the government issues a permit.¹³³ She might grant the prospective purchaser an option, so that the purchaser can use the option period to seek the necessary permits.¹³⁴ She might ground lease the property to the would-be buyer, with the rental obligation to commence only after the tenant receives his permit. She might wait to see how other, similar landowners fare with their permit applications, as a means of determining whether her initial assumptions about the permitting process are accurate. Under each of these alternatives, the seller

appears to lose twice, paying takings compensation to one party and then granting a permit to the other. Inconsistent outcomes such as these should be uncommon and should at least be offset by those cases in which the government neither pays compensation to the pre-enactment owner nor grants relief to the post-enactment buyer.

¹³⁰ See George Lefcoe, *How Buyers and Sellers of Development Land Deal with Regulatory Risk*, 32 REAL PROP. PROB. & TR. J. 301, 302–08 (1997) (discussing allocations of risk).

¹³¹ See *id.* at 308–21 (describing different ways of addressing these risks contractually); *infra* notes 133–37 and accompanying text (discussing several options).

¹³² See *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 871 (N.Y. 1997) (discussing availability of conditional sales).

In at least one other case, the seller recognized this problem and attempted to transact her way around it. See *Carpenter v. Tahoe Reg'l Planning Agency*, 804 F. Supp. 1316, 1322 (D. Nev. 1992) (explaining how seller declared at time of sale that she did not waive any takings claim and that she was selling out of desperation). While I recommend against permitting this particular option, see *infra* notes 182–88 and accompanying text, the seller here was creative in attempting to preserve her claim while selling the property. Note also that the claim that the *Carpenter* court allowed the seller to preserve was an already completed temporary takings claim rather than a not-yet-ripe as-applied claim. See *supra* note 117.

¹³³ The evidence suggests that Gazza and his seller considered employing this structure but were too impatient to wait. See *supra* notes 3–5 and accompanying text; see also *Ciampitti v. United States*, 22 Cl. Ct. 310, 317 (1991) (noting testimony of plaintiff's expert witness that "a reasonable and prudent buyer would condition a sale on buildability"); *Alegria v. Keeney*, 687 A.2d 1249, 1251 (R.I. 1997) (noting that post-enactment buyer "could have protected himself by including a contingency clause in the contract of sale, but . . . failed to" and thus "was not entitled to compensation for what amounted to an error of judgment"); Lefcoe, *supra* note 130, at 310–14 (emphasizing importance of careful drafting and noting risks this approach can create for sellers).

¹³⁴ See Lefcoe, *supra* note 130, at 319 (discussing use of options).

continues to own the property until she obtains more information or until the government decides finally whether it will grant the permit. The seller thereby maintains her status as the owner of the property, and traditional takings law, rather than this Article's proposed test, will continue to apply.¹³⁵ In other words, in those situations in which the bringing of a sale-ripened claim is most likely to disadvantage a pre-enactment owner, that owner can structure her transaction so that any claim she might have will be a denial-ripened one.

The seller may argue that she is being forced to structure her desired transfer of the property around the new permitting requirement, acting differently than she otherwise would have solely to maximize the value of her property and of her potential constitutional claim. But property owners do that all the time, no matter what the law is and how it changes.¹³⁶ The approach urged in this Article seeks to guarantee the pre-enactment owner that she will not lose an otherwise viable takings claim if she decides to transfer the property rather than using it herself. The fact that she has so many options available should reassure her that she can use the property productively, transfer it for fair consideration to someone else who can, or preserve her constitutional claim.

Moreover, the adoption of this approach minimizes the likelihood that the government will intentionally overregulate in cases in which it usually grants permits but the impact of a denial is enormous. The original owner's ability to structure the sale in a way that preserves the takings claim will act as a check on the government, which will know that the final act that ripens this modified type of takings claim is entirely within the landowner's control. The government hardly could plot to avoid takings liability by relying upon an impaired owner to act in a way that harms her own claim, especially when many superior alternatives remain available to this owner. If the approach recommended here were universally adopted and publicized, more pre-enactment owners would become aware of this issue and would seek advice from lawyers or real estate professionals, and the number of parties who inadvertently give up otherwise valid legal claims would diminish. Rather than selling their property outright and forfeiting their claims, pre-enactment owners with viable claims likely will take great pains to pursue them properly and will have the capacity to do so. The

¹³⁵ All but the last of these alternatives ensure that she retains title until the denial is certain, the takings claim is ripe, and the dollar value of any compensable loss can be ascertained with some certainty. The last variant allows the seller to obtain additional information before deciding what to do next.

¹³⁶ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960) (suggesting that rational economic actors behave in ways that maximize wealth, no matter what applicable legal rules are). If Professor Coase is correct, then all persons can be expected to act in this way all of the time. Property owners routinely structure deals in ways that reduce their potential tax and tort liabilities.

advantage to the government of acting improperly may never fully reach zero, but adoption of this approach suggests that it will approach zero over time.¹³⁷

3. Significant Impact on the Property if the Permit Is Denied with a Low Likelihood That the Government Will Grant the Permit

Finally, consider cases in which the diminution in value resulting from a permit denial is significant but there is only a low likelihood that the government will grant the permit. Once again, the original owner who retains the property and applies for a permit can expect one of two possible results. In the large majority of cases, her request for a permit will be denied, leading to a large drop in the value of the property. She now will possess a denial-ripened takings claim that is likely to succeed. Less often, the government will grant her permit, which will restore the property to its original value. Whether she receives a permit or just compensation, she should break even in the end.¹³⁸

If the original owner decides that she would rather sell her property without pursuing the permitting process, then any potential buyer will discount his offer for this newly restricted property by a sizable amount, reflecting the high likelihood of a permit denial and the large drop in value that this denial will cause. Under this Article's proposal, the original owner's sale of the property would ripen her takings claim. Her diminution in value here would be substantial, and she stands a significant chance of prevailing on this sale-ripened claim, though not so great a chance as if she had applied for a permit herself and been rejected.¹³⁹ Moreover, a court would hear this sale-ripened claim more quickly than it would hear any denial-ripened claim.

The approach recommended here may not be completely outcome neutral on these facts, but it is more likely to be outcome neutral than it was on the facts

¹³⁷ Recognize as well that regulatory bodies that fear takings claims are likely to pay close attention to these permit applications and to seek to compromise or settle contested applications. The original owner or a post-enactment buyer may be able to work out any differences with the government entity, which means that the dispute can be resolved before the need arises to structure the sale in a cumbersome way. The very fact that the seller and buyer can arrange their affairs so as to preserve the takings claim suggests that they may not actually have to do so, because the government's knowledge of this possibility will encourage it to reach a reasonable resolution in cases in which takings liability otherwise might result.

¹³⁸ These statements are based on the same assumptions and subject to the same qualifications as those in the previous subsection. *See supra* notes 124–27 and accompanying text. Once again, this subsection is positing an extreme set of facts for illustrative purposes.

¹³⁹ Her loss is not as great under conditions of uncertainty as it would be if she had received a certain denial. Any potential buyer should be willing to pay slightly more for the property than he would be if the permit already had been denied, reflecting the possibility that he will be able to secure a permit. *See supra* note 122.

described in the previous subsection.¹⁴⁰ If the drop in value that the owner experiences by selling untested property is as large as the drop that she would suffer if she applied and were denied, then the owner stands a strong chance of winning her takings claim. This will be true, however, only when the likelihood of denial is quite large.¹⁴¹ The greater the likelihood that the government will issue a permit, the more a prospective buyer will be willing to pay for the property, and the more a prospective buyer pays, the less likely it is that the original owner's sale-ripened takings claim will succeed. As we move from likely denials to likely approvals, this case begins to look less and less like a probable winner for the seller and more and more like the example that the previous subsection examined. That discussion noted that the owner who is worried that her claim will fail solely because it is sale-ripened can structure the deal in a variety of different ways that minimize this risk.¹⁴²

In sum, when the consequences of a denial are significant and the likelihood of receiving a permit is close to zero, as they are in this subsection's hypothetical case, the pre-enactment owner should be as likely to win if she sells the property as she is if she retains it and unsuccessfully attempts to develop it. When the consequences of a denial are significant and the likelihood of receiving a permit is fairly high, as they are in the previous subsection's hypothetical case, a sale of the property might hurt her legal position, but she has numerous alternatives to an outright sale. As long as she plans her actions with some care, the pre-enactment owner should be able to effect a transfer of the property in a way that does not harm her legal position. Judicial recognition of sale-ripened claims thus would allow the pre-enactment owner to transfer her property rights to a post-enactment buyer without significantly impairing her likelihood of success on any subsequent takings claim.

4. *The Outcome Neutrality of the Proposed Analysis*

This Part has suggested that a rule allowing pre-enactment owners to sell their property without forfeiting the right to takings compensation would treat them fairly while affording them the flexibility either to retain or to convey their property. The approach recommended here will allow pre-enactment owners to

¹⁴⁰ See *supra* Part III.D.2.

¹⁴¹ In theory, these drops in value will match only if a permit denial is certain. In fact, the numbers may match even if there is some uncertainty. This is because the pre-enactment owner who sells her property must compensate the buyer for purchasing these risks and for bearing the transaction costs of pursuing a permit. See *infra* note 150 (discussing these additional components of price).

¹⁴² See *supra* notes 130–37 and accompanying text (discussing alternative structures for these transactions).

sell their untested property if they wish, to preserve the right to bring a takings claim, and to see that claim ripen immediately, without significantly altering their chances of prevailing. Owners will have little reason to fear that selling their property will cost them compensation that they deserve, while government entities will not be relieved of their obligation to pay compensation solely because an owner would rather sell than fight. Meanwhile, the post-enactment buyer of this property will suffer no loss because he has the opportunity to factor the effects of the new law into his assessment of the property's worth before he buys it.

The illustrations just offered are designed to demonstrate the effectiveness and the outcome neutrality of the analysis that this Article recommends. The examples show that legal recognition of sale-ripened claims would work well in most cases and that the few complications these claims might create are minor, predictable, and easily adapted to. If the loss that will result from a permit denial is small to modest, as in the first example, then the suggested approach should have little effect on the original owner no matter how likely it is that the owner will receive a permit. The seller probably would not recover even if she tested the effects of the new law herself, and her sale of the property has little impact on her slim odds of prevailing. The seller does need not to worry that a particular course of action might cause her to lose a valuable constitutional claim, and the government does not need to fear that the owner will act strategically so as to increase her chances of recovering.

If the loss that will result from a permit denial is substantial, however, the seller might well recover if she were to apply for a permit and be rejected. The alternative offered here protects this owner if she instead sells her property without determining the consequences of the new regulation. In those cases in which the effect of a denial is substantial and the likelihood of a permit is slight, as in the third example, the owner has a significant chance of recovering no matter which path she chooses. If the effect of a denial is substantial but the government shows a greater readiness to issue permits, as in the second example, then the individual owner who chooses to sell her property without testing the new law might find that the decline in sale price that she suffers is small enough to be noncompensable. This same owner, if she had chosen instead to apply for a permit herself, would either receive her permit and suffer no loss or receive a denial that leaves her with a viable takings claim. In this one set of circumstances, the legal recognition of sale-ripened claims might unfairly harm pre-enactment owners as a group and might shield government bodies as a group from liability.

This concern proves to be a minor one. A case falls into this troublesome category only if the government entity is fairly likely to grant a permit, the government's denial of a permit would cause a catastrophic diminution in value,

and the seller would prefer selling the property to developing it herself. Few cases will display this combination of characteristics. In those cases in which this grouping of factors is present or in which the original owner fears that it might be, she retains a variety of tenable options that allow her to accomplish her goal without forfeiting her claim.¹⁴³

Finally, note that while this Article's proposed approach is outcome neutral overall, it may not be outcome neutral in every case. On the one hand, pre-enactment owners will benefit by retaining their claims without the need to retain their property and by ripening their claims more quickly than they can under existing takings law. A landowner who might not survive the process long enough to bring a claim under current law instead will be able to sell her property and commence a sale-ripened claim much more quickly. On the other hand, these same landowners weaken their claims slightly by reducing the amount of loss that they suffer as a result of the government's actions. Instead of suffering a "full" diminution in value equal to the drop in sale price caused by a permit denial, these sellers experience a "partial" diminution equal to the drop in sale price caused by the uncertainties of the permitting process that they have not pursued.

In many cases, these factors are likely to balance each other out, but not in every case. Some landowners may end up strengthening their legal position by selling their property while others may discover that retaining their property has increased their chances of winning. This suggests that while this Article's proposals will be outcome neutral in the long run, they may not be outcome neutral with respect to every plaintiff and every parcel of land. Some owners who might have lost will win, some owners who might have won will lose, and the net substantive effect is likely to be nearly neutral. The enormous uncertainties in substantive takings law and the difficulties of predicting in advance which landowners will profit under this approach make it unlikely that property owners will attempt to act strategically to increase their chances of prevailing.¹⁴⁴ Meanwhile, landowners enjoy the benefit of additional flexibility, and government entities are no worse off than they are under current law.

E. Gazza's Seller's Case as a Test of the Suggested Analysis

Section C recommended an approach that courts should follow to protect pre-enactment owners who sell their property without pursuing a permit application to completion. That Section argued that the pre-enactment owner

¹⁴³ See *supra* notes 130–37 and accompanying text (discussing several options).

¹⁴⁴ Given how uncommon takings compensation is, landowners are more likely to use these proposals defensively than offensively. In other words, few landowners will sell untested property for the sole purpose of ripening their takings claims more quickly. See *supra* note 117.

who sells property should be entitled to bring a takings claim arising from this sale of the untested property. This takings claim will differ from more traditional as-applied claims, which ripen after the final denial of a permit. The act of selling the property after a change in the law will crystallize the seller's damages and will ripen the pre-enactment owner's previously unripe as-applied claim.

To test the value of this approach, let us examine the case that might have been brought by Gazza's predecessor-in-title, a man named Anton Notey,¹⁴⁵ after he sold the property to Joseph Gazza.¹⁴⁶ Assume that the vacant lot is suitable only for residential development or recreational use, that it is worth \$400,000 if a house can be built on it, and that it is worth only \$80,000 if it must remain undeveloped.¹⁴⁷ Assume further that Notey acquired the property before the regulations went into effect.¹⁴⁸ Gazza and Notey are uncertain whether DEC will grant a permit, but they wish to consummate the transaction before they can

¹⁴⁵ See Mitchell Freedman, *DEC Ruling Appealed*, NEWSDAY, Feb. 19, 1992, at 26 (referring to "the previous owner, Anton Notey"). But see Martin Fox, *Buyer's Knowledge of Land's Designation Ruled Fatal to Claim*, N.Y.L.J., Dec. 11, 1995, at 1 (stating that Gazza acquired property "from the Internal Revenue Service, which earlier had placed tax liens on the site"). The published opinions do not conclusively resolve this disagreement, which was immaterial to the case, but do note that the property was subject to a \$90,000 tax lien that Gazza paid off after his purchase. See *Gazza v. New York State Dep't of Envtl. Conservation*, 634 N.Y.S.2d 740, 742 (N.Y. App. Div. 1995) (implying that IRS held lien but was not prior owner). For purposes of the partially hypothetical discussion that follows, it is helpful to assume that the prior owner was an individual rather than a government agency.

¹⁴⁶ I have extrapolated from the actual facts of *Gazza*, because not all of the facts necessary for this analysis are available from the case reports and news reports. I also have rounded some of the numbers, for ease of calculation. See generally *supra* notes 1-10 and accompanying text (discussing *Gazza*).

¹⁴⁷ The case and the news reports are unclear as to whether *Gazza's* land was completely unbuildable after the denial. One article suggested that somewhere between 15,000 and 20,250 square feet of the lot remained buildable even after DEC denied the permit. See Freedman, *supra* note 145, at 26. That same article noted, however, that the Town of Quogue requires that all houses be set back at least 40 feet from the road while DEC regulations insist upon a 100-foot setback from the wetlands in the rear. See *id.* In order to make the discussion here as valuable as possible, I will assume that the land is not buildable in light of DEC's permit denial. The facts presented in *Gazza* suggest that this assumption may not be entirely accurate.

¹⁴⁸ If he did not, then one of his predecessors-in-title surely did, and the analysis would apply to the person who owned the land in 1973 when the Tidal Wetlands Act became effective, in 1977 when the land became subject to wetlands regulations, or in 1981 when those regulations were expanded. See *supra* note 2 and accompanying text. The *Gazza* court had no need to trace title that far back, as *Gazza*, who purchased the property in 1989, was the only plaintiff.

One news account states that Notey did apply for a permit in 1981 but is unclear as to how that application turned out. See Freedman, *supra* note 145, at 26. The judicial opinions make no mention of any permit applications prior to *Gazza's* acquisition of the property.

find out, and they agree upon a price of \$100,000.¹⁴⁹

This agreed price tells us a great deal about the parties' expectations concerning the new permitting process. Notey actually has transferred two assets to Gazza: an undevelopable lot and an uncertain chance of receiving a state permit that will allow him to develop it. The undevelopable lot is agreed to be worth \$80,000, which means that the gamble on the building permit has been priced at \$20,000.¹⁵⁰ If Gazza receives his permit, the property will increase in

¹⁴⁹ See *supra* notes 2–9 and accompanying text (discussing sequence of events and price of land in Gazza).

¹⁵⁰ Cf. Jones, *supra* note 78, at 41 (comparing land speculators to gamblers); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1238 (1967) (employing analogy to "sweepstakes ticket").

This calculation overlooks the fact that the buyer is entitled to be paid a risk premium. The original owner is conveying the untested property to the buyer for several reasons, one of which is a desire to convey risks and uncertainties to someone who would rather bear them. The seller must pay something to the buyer in return for this peace of mind; the buyer is entitled to consideration for the bearing of this risk. This consideration should factor in both the risk of loss and the magnitude of that loss. Moreover, real estate developers, like more traditional insurers, seek to operate at a profit. Thus, the buyer may insist on augmenting this premium still further, and the risk premium will consist partly of "true" consideration and partly of profit. Any time an original owner seeks to sell untested property to a post-enactment buyer, that buyer is entitled to this type of risk premium, which will be factored into the sale price of the property even if the parties do not overtly acknowledge its existence.

William Fischel has argued against a private takings insurance approach, citing its demoralization costs. See FISCHEL, *supra* note 87, at 192 (noting that "the very need to buy insurance gives rise to demoralization costs"). The insurance component of this Article's proposal will not increase owners' demoralization costs beyond those imposed by current takings law. Owners remain free to retain their land and take their chances in court. If they would rather sell the land and the risk to someone else, however, this Article's proposal allows them that option.

This premium is in addition to any consideration that the buyer may demand in return for the costs that he necessarily will incur in pursuing a permit. The buyer must pay application fees, legal fees, and consulting fees, and must carry the property during the pendency of the application. Carrying costs, including interest, taxes, and insurance, can be enormous. See *generally supra* notes 3, 59, 75, 79, 123, 128, 141; *infra* note 152.

A government body may worry that an owner and her buyer might be tempted, under the proposed approach, to agree collusively to a sale price that understates the actual value of the untested lot, even after factoring in the likelihood that the land will be unusable, the risk premium, and the transaction costs. If this happens, the buyer receives a bargain on the land and the seller ripens her constitutional claim quickly and increases her odds of prevailing. The government then will be forced to show that the seller's sale price is so low that it does not represent the true post-enactment value of the property in light of these factors. Given how infrequently landowners win takings claims, it seems unlikely that any pre-enactment owner would sell her property for less than it is worth in its restricted state solely to magnify the losses

value by \$320,000; if DEC denies it, it will remain worth \$80,000.¹⁵¹ The fact that Notey sells Gazza an uncertain chance of receiving a permit worth \$320,000 for \$20,000 suggests that the chance of receiving a permit is about one in sixteen.¹⁵² If Gazza obtains his permit, he has paid \$100,000 for a \$400,000 lot. If Gazza fails to obtain his permit, he has paid \$100,000 for an \$80,000 lot.

On these facts Gazza plainly should be prohibited from bringing a claim for takings compensation. If he receives his permit, he has won his gamble and has no legal claim at all. If, as is more likely, his application is denied, then he simply took a business risk that did not pan out and the state should not be

that she can show years later in court. If such a case were to arise, the court would need to make explicit that its examination of the sale price factors in a reasonableness requirement. Since takings law focuses on fair market value rather than on actual sale price, this standard already is implicit.

¹⁵¹ This Section will treat the state permit as the only one in dispute. In fact, part of Gazza's problem appears to have arisen because of inconsistencies between Quogue's and DEC's regulatory schemes. See *supra* note 147 (discussing contradictory setback requirements).

¹⁵² The fact that Gazza paid \$100,000 for the lot implies that the odds of a permit actually are slightly better than 1 in 16. Gazza is assuming the risk and the inconvenience of the permitting process and presumably received consideration from Notey for accepting these burdens. See *supra* note 150. This imputed consideration most likely took the form of a price decrease. In other words, the unbuildable land is worth \$80,000 and the chance for the permit is worth a bit more than \$20,000, but Notey sold this chance to Gazza for only \$20,000, with the discount reflecting Notey's premium to Gazza. If the chance truly was worth somewhat more than \$20,000, then the odds of a permit are slightly more favorable than the 1 in 16 posited in the text.

Other factors may further complicate the calculation of the lot's value. If Gazza bought the lot in 1989 for \$100,000 and his appraiser opined that it was worth \$400,000 in 1992, some portions of that increase must have been caused by inflation and by appreciation of the land due to other factors. The 1 in 16 odds are reduced further if we assess both prices in constant dollars and adjust for "background" appreciation. Thus, my 1 in 16 figure should be seen as a rough approximation that illustrates the effectiveness of this Article's proposal and not as a precise figure.

In addition, one or both parties may miscalculate the value of the encumbered property, the value of the unencumbered property, the likelihood of receiving a permit, the likelihood of one party or the other recovering takings compensation, or the amount of that compensation. These are private law matters for the parties to negotiate and should not have any impact on subsequent judicial analysis of the problem. The public treasury need not reimburse buyers and sellers who misjudge the effects of a land use law when allocating risks among themselves. See *supra* note 78 (discussing miscalculations). Cf. *M & J Coal Co. v. United States*, 30 Fed. Cl. 360, 368 (1994) (pointing out that landowners "knowingly entered into a highly regulated industry" and concluding that compensation is unwarranted because "they cannot claim [the Office of Surface Mining's] execution of existing regulations was unforeseeable at the time they made their investment"), *aff'd*, 47 F.3d 1148 (Fed. Cir. 1995).

required to compensate him for this loss. In fact, this is almost precisely what the New York Court of Appeals held.¹⁵³

This point seems even more obvious when we consider the position that Gazza would have been in had he acquired more than one lot. If Gazza had hedged his bet by purchasing sixteen lots at once—presumed to be identical for purposes of this hypothetical—he would receive, on average, one permit.¹⁵⁴ He then would own fifteen unbuildable lots worth \$80,000 each and one buildable lot worth \$400,000. This would give Gazza's sixteen lots a total value of \$1.6 million, and he will have paid \$1.6 million for them. It obviously would be unfair to allow Gazza to keep the one permit he received and pursue takings claims for

¹⁵³ See *Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1042 (N.Y. 1997) (noting that "petitioner's reasonable expectations were reflected by his consideration of the inherent limitations on the property when he made the purchase offer for thousands less than its worth without the restrictions"); see also *Florida Rock Indus. v. United States*, 791 F.2d 893, 903 (Fed. Cir. 1986) (noting that "frustration in performance of even an existing contract is not a taking of contract rights, still less a hope of future profitable contracts") (citation omitted); *Good v. United States*, 39 Fed. Cl. 81, 114 (1997) (concluding that "[w]hile plaintiff was free to take the investment risks he took in this regulated environment, he cannot look to the Fifth Amendment for compensation when such speculation proves ill-taken"), *aff'd*, 189 F.3d 1355 (Fed. Cir. 1999); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 611 (M.D. Fla. 1989) (observing that "McNulty purchased . . . [his shallow lot] in 1963 for \$25 a front foot when lots of suitable depth for residential building were selling for \$500 a front foot" and concluding that "[t]his disparity surely alerted McNulty to the probability that his property was not suited for all of the same uses that a deeper lot would be") (citations omitted); Michelman, *supra* note 150, at 1237 & n.124 (applying analogy to sweepstakes ticket while urging that this analogy be used with caution); *supra* notes 78, 89 and accompanying text.

See generally Daniel R. Mandelker, *Investment-Backed Expectations in Takings Law*, in *TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER DOLAN AND LUCAS*, *supra* note 88, at 119, 129:

Investment-backed expectations held by property owners arise at the time of purchase, and the information the owners have then about their property gives them meaning. For example, if a landowner knows at the time she enters a land market that she is, or might be, covered by a regulatory program in which government can deny permission to develop her land, it is only fair that she assume the regulatory risk this program creates.

¹⁵⁴ The Appellate Division noted that Gazza was an experienced real estate developer as well as a lawyer. See *Gazza v. New York State Dep't of Envtl. Conservation*, 634 N.Y.S.2d 740, 742 (N.Y. App. Div. 1995) (noting that "petitioner is an attorney who owns 50 rental properties, as well as commercial, industrial, and office buildings"). Gazza should not be held to a higher standard of knowledge than a less experienced landowner. Unlike other possible buyers, however, Gazza may have possessed the expertise and financial resources necessary to hedge his bets by purchasing numerous lots with uncertain regulatory outlooks, on the assumption that he would turn a profit overall. Other landowners may not be quite so savvy.

the other fifteen lots when he knew what the state of the law was at the time of his purchases, accurately factored all uncertainties into his bids, and realized precisely the investment return he anticipated when the process unfolded just as he predicted. By buying sixteen lots, Gazza would be self-insuring, diversifying his investments so that the financial gains from the buildable lot will offset the financial costs of the unbuildable ones, on average. In the actual case, Gazza instead acquired a more volatile real estate portfolio of just one lot, but that was his choice. The government should not be forced to insure a gambler against his losses simply because he took a larger risk and came up empty.¹⁵⁵

This Section is more interested in Notey's legal status than that of Gazza, however. If we assume that Notey acquired the property before the restriction took effect, then he is a pre-enactment owner, his long-held expectations have been disappointed by the new law, and this Article's proposed analysis should apply to him. He might eventually have had a valid denial-ripened-as-applied takings claim, and the analysis proposed here would allow him to retain this claim in a modified form and to ripen it even if he decides to sell his land. Notey would argue that land worth \$400,000 before the change in the law now can be sold for no more than \$100,000.¹⁵⁶ The success of this new type of claim will

¹⁵⁵ Some developers may not have the financial capacity to buy property in sixteen-lot blocks. If they are afraid of the risks that an undiversified one-lot portfolio brings, then perhaps other, safer investments will be more to their liking. Even within the broad category of real estate, they might prefer to invest in land that is subject to a less volatile permitting process or in shares of a larger entity that owns numerous real estate projects. The government need not pay takings compensation to a developer simply because he chooses to undertake a riskier investment than someone in his financial position ought to be taking.

¹⁵⁶ The \$400,000 appraisal for developable land may overstate Notey's case. For one thing, part of the value his appraiser is attributing to the now-unbuildable lot may arise from the fact that the new regulation has reduced the number of buildable lots. DEC might rebut Notey's evidence by showing that the lot was worth only, say, \$200,000 before the regulation became effective, and that the subsequent increase in value to \$400,000 is due to the scarcity of buildable lots caused by the regulation itself.

Similarly, if the government artificially caused property values to rise sometime after his acquisition of title and now has artificially caused them to slip back to where they would have been, Notey has not been deprived of any expectation that he formed at the time he decided to invest in the land. The government is not required to compensate owners for groundless optimism, particularly when that optimism was caused by the government's gratuitous acts. *See Avenal v. United States*, 100 F.3d 933, 937-38 (Fed. Cir. 1996) (acknowledging that landowners may capitalize on government-created opportunities as they arise, while also recognizing that these landowners have no right to expect these opportunities to continue or to be compensated if they do not).

In addition, Notey's reasonable investment-backed expectations must be adjudged as of the time he acquired the lot. If he purchased the property 30 years ago for \$8,000, the question becomes whether he had a reasonable investment-backed expectation at that time that the property would be worth \$400,000 today, as opposed to \$100,000. It could be that the

depend upon the specific facts of the case, but his chances of prevailing after a sale of the property usually will not differ much from his chances of prevailing if he unsuccessfully seeks a permit on his own.¹⁵⁷

As demonstrated above,¹⁵⁸ however, Notey may occasionally weaken his legal status by selling the property and then bringing a takings claim based on the reduced price. In the actual case, land that may have been worth \$400,000¹⁵⁹ before the enactment ended up selling for \$100,000, and Notey could have argued that he suffered a 75% diminution in value. Had he applied for a permit and been rejected, however, his chance for a permit would be reduced to zero, the value of the undevelopable land would drop to \$80,000, and Notey could have argued that his land had diminished in value by 80%. While these numbers make it unlikely that Notey would have prevailed no matter how he acted,¹⁶⁰ in some cases, this difference in diminutions might be outcome determinative.¹⁶¹ There is, then, a slim possibility that a seller who disposes of property before seeking a permit will reduce his losses just enough to cost himself a successful takings claim. In other words, there is a small subset of cases, probably not including *Gazza* itself, in which Notey's sale-ripened claim fails but his denial-ripened claim would have succeeded.

This is not likely to be a common problem. The odds that Notey could have prevailed on a takings claim following a permit denial are quite small. The odds that his sale of the property without pursuing a permit application "pushed him

difference between a \$400,000 lot and a \$100,000 lot is the difference between an outstanding return and a good one; if so, then Notey loses. *See generally supra* note 109 (discussing valuation).

¹⁵⁷ *See supra* Part III.D.

¹⁵⁸ *See id.*

¹⁵⁹ *See generally supra* notes 109, 156 (discussing valuation).

¹⁶⁰ The New York Court of Appeals found that *Gazza's* loss did not reach the level of a *Lucas*-type taking. *See Gazza v. New York State Dep't of Env'tl. Conservation*, 679 N.E.2d 1035, 1043 (N.Y. 1997) (finding that economic value of property had not been extinguished). That court had no reason to decide whether his loss amounted to an impairment of his reasonable investment-backed expectations, but *Gazza's* concession that the lot that he had purchased for \$100,000 still retained a value of \$80,000 would have weakened that argument. *See id.* at 1037. It is difficult to assess how Notey's claim would have fared without knowing the date and price at which he purchased the property, but the high residual value of the lot suggests that Notey's claim would have failed under either test, even if he had applied for a permit himself and been rejected.

¹⁶¹ *See supra* Part III.D. As noted above, the \$20,000 that Notey received in addition to the \$80,000 value of the undevelopable land is the amount that *Gazza* was willing to pay for a chance at receiving a permit. Had Notey applied for a permit himself and been rejected, the chance at a permit would vanish and a subsequent bidder would discount any subsequent bids accordingly. Thus, Notey's claim would have been stronger, albeit much delayed, had he been rejected than it would have been had he sold the lot without testing the new law.

back over the line" and undercut an otherwise viable claim are smaller still.¹⁶² If a seller fears that he will fall within this subset of cases, or if he is uncertain, he is free to insist on an alternative structure that will allow him to preserve his claim while also meeting his buyer's needs.¹⁶³ In the few cases in which this Article's approach might appreciably diminish a pre-enactment owner's chances of success, that owner can set up a transactional structure that minimizes this problem.

More commonly, judicial recognition of sale-ripened claims will be outcome neutral without any extra effort by the parties. In other words, under this test, the pre-enactment owner is destined either to lose no matter how she responds to the new law or to win no matter how she responds. *Lucas v. South Carolina Coastal Council*¹⁶⁴ illustrates the latter case nicely. The *Lucas* Court held that the state's Beachfront Management Act so impaired Lucas's property rights that he was deprived of all economically viable use of his property.¹⁶⁵ Suppose David Lucas, a pre-enactment owner,¹⁶⁶ had decided instead to sell his land before ripening his takings claim. If, as the Court held, the regulation truly destroyed all of the land's economically viable use,¹⁶⁷ permit denial was certain or nearly so, and variances

¹⁶² Recall that most regulatory takings claims fail even if the original owner applies for a permit, is denied, and then pursues a ripe regulatory takings claim. The court probably would not have found a taking even after a permit denial caused the value of Notey's property to drop by 80%, because the lot still had significant residual value and the permit denial did not deprive him of substantially all economic use. If this is true, then Notey was destined to receive neither a building permit nor takings compensation no matter what he did with his land. Neither Notey nor Gazza knew this for sure at the time of the sale, and the uncertainty enabled Notey to sell the property to Gazza for \$20,000 more than it proved to be worth. This means that Notey insured wisely, receiving a small but sure payment rather than gambling this \$20,000 on an unlikely permit. On these facts, DEC regulated the land fairly without effecting a taking, Gazza spent an additional \$20,000 in the optimistic but ultimately misplaced belief that he would get a permit, and Notey profited somewhat by selling the land before receiving a definite rejection.

¹⁶³ See *supra* notes 130–37 and accompanying text (discussing these alternative structures).

¹⁶⁴ 505 U.S. 1003 (1992).

¹⁶⁵ See *id.* at 1030–32. The Court remanded the case to the South Carolina Supreme Court to determine whether the state's actions fell within the nuisance exception. See *id.* The state court decided that this case did not fall within the nuisance exception, and remanded the case to the trial court for a determination of just compensation. See *Lucas v. South Carolina Coastal Council*, 424 S.E.2d 484 (S.C. 1992). The parties then settled for \$1.5 million. See H. Jane Lehman, *Accord Ends Fight over Use of Land; Property Rights Activists Gain in S.C. Case*, WASH. POST, July 17, 1993, at E1.

¹⁶⁶ See *Lucas*, 505 U.S. at 1006–07 (noting that Lucas bought lots in 1986 and that state enacted Beachfront Management Act in 1988).

¹⁶⁷ See *id.* at 1030–32.

were unavailable,¹⁶⁸ then Lucas would have had to sell the land for next to nothing.

Under the analysis recommended here, Lucas's hypothetical pre-application sale of his land would immediately ripen his state takings claim, and the severely diminished sale price would strengthen it. Instead of winning the claim that he won, Lucas would have sold his land at a fire sale price and then would have been able to prevail by showing how the post-enactment sale deprived him of all economically viable use of his land. In other words, the rule proposed here would have allowed Lucas to retain his right to compensation even if he had decided to sell his land before ripening a traditional takings claim. At the same time, the rule would have permitted any buyer to purchase the land for what it was worth in its untested state but with no right to compensation if his hopes eventually were disappointed, as they probably would have been.

Had Lucas been able to sell the property for a more reasonable price—though not necessarily as much as he paid or had hoped to receive¹⁶⁹—it would suggest either that his buyer believed a permit would be more readily available or that even unbuildable land would have considerable value. This belief, reflected in a higher sale price, would imply that Lucas's case was a weak one and would have been weak even if he had retained the property and ripened his claim in the more traditional way. In other words, it would suggest that *Lucas* was more like *Gazza*. If Lucas recognized in advance that his facts were unfavorable in this way, he would be forced to acknowledge that he probably has no right to compensation, that he will suffer a modest to large loss no matter how he acts, and that he should let factors other than his vain hope for compensation determine his actions. And if Lucas was uncertain about where he fell on this spectrum of possible outcomes, or if he feared that a premature sale of the property might be just damaging enough to cost him the compensation he deserved, he could have structured his transaction in a way that preserved the possibility of later bringing a takings claim.¹⁷⁰

¹⁶⁸ The Court found that Lucas could not have obtained a permit under the South Carolina legislation. This seems to have been correct for at least the first two years in which the act applied to Lucas's property. *See id.* at 1010–11 (describing original Act and amendments to it). The state amended the Act in 1990, permitting landowners to seek variances under certain conditions. This suggests that Lucas's post-1990 claim was not ripe; the Court, however, seemed unconcerned with this issue and proceeded directly to the merits of the case. *See id.* at 1012–14 (dismissing ripeness concerns). Whether or not the Court was correct on this ripeness issue, it is evident that the likelihood of a permit was virtually zero before 1990, though possibly a bit higher afterwards.

¹⁶⁹ *See supra* notes 109, 156 (discussing value of land under uncertain conditions).

¹⁷⁰ *See supra* notes 130–37 and accompanying text (discussing these alternative structures).

Interestingly, Justice Blackmun would have denied Lucas any compensation, based in

F. *Unripe As-Applied Claims: Other, Inferior Options*

I have argued in this Article that a pre-enactment owner who sells her property after a new law takes effect should retain her right to bring an as-applied takings claim against the enacting jurisdiction and that the claim should ripen at the time of the sale. The sale itself will be the last step in the evolution of her claim, ending her legal relationship with the land and thereby allowing her to show with certainty the impact of the regulation upon her property rights. This approach promptly and fairly protects pre-enactment owners who would rather sell their property than attempt to develop it and avoids offering a possible windfall to their purchasers or to the government. The proposal that I advocate here is not the only possible resolution of this tricky problem, however, and this Section will discuss three alternative resolutions and demonstrate why each of them is an inferior choice.

As a first alternative, a court could decide that when a pre-enactment owner sells her property, she simultaneously deeds her unripe or partially ripe claim to the buyer.¹⁷¹ The *Anello* and *Gazza* opinions recognized this possibility without endorsing or rejecting it.¹⁷² The claim will ripen only after the buyer finishes working his way through the regulatory process and fails to receive a permit.

part on the Justice's inference that Lucas, an experienced real estate developer, should have been able to predict when he bought the land that it soon might be regulated. *See Lucas*, 505 U.S. at 1037-39 (Blackmun, J., dissenting). Lucas may not actually have purchased his land after the Beachfront Management Act went into effect, but he did purchase it after the time when a real estate developer could have seen it on the horizon.

Justice Blackmun's analysis thus treats Lucas in much the way that I would treat a post-enactment buyer, by assuming that such a buyer's reasonable investment-backed expectations factor in all that the buyer knows or should know about the property. Unlike Justice Blackmun's analysis, which would include foreseeable future changes in the law within the buyer's reasonable investment-backed expectations, my analysis here is limited to actual changes in the law predating the owner's acquisition of title. *Cf. supra* note 87 (citing cases going each way).

¹⁷¹ The claim that is assigned under this alternative is a denial-ripened takings claim and not a sale-ripened takings claim. *Cf. infra* notes 182, 189 (discussing two other alternatives to this Article's approach).

As noted earlier, this option is not available under the federal Assignment of Claims Act. *See supra* note 62. In those states that do not prohibit assignments of claims, however, there would seem to be no barrier to adopting this approach when the government entity is the state or some agent or subdivision of the state.

¹⁷² *See Gazza v. New York State Dep't of Envtl. Conservation*, 679 N.E.2d 1035, 1039 n.4 (N.Y. 1997) (recognizing possibility of transferring claims and deferring consideration of issue); *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 872 n.2 (N.Y. 1997) (same). The New York Court of Appeals implied that the seller would have to grant this claim to the buyer expressly. A different state court instead might hold that the underripe as-applied takings claim passes to the buyer automatically when the seller deeds the property to the buyer.

This approach would allow the buyer, who is on notice of the intervening restriction, to discount his offer because of his knowledge of the regulatory risks and then, potentially, to seek takings compensation if a permit is denied. This alternative appears at first glance to allow the buyer to hedge his investment at the expense of the government defendant. If the permit issues, then the buyer bought the property at a discount because of the restriction and now can do what he wants with the property: He took a business risk and the risk paid off. If the permit is denied, then the buyer bought the property at a discount because of the restriction, failed to receive the permit that he knew all along he might not receive, and now seeks compensation for that denial at the public's expense: He gambled, lost, and now may receive compensation for that loss.¹⁷³

The response to this argument, of course, is that the buyer's price discount in this case is lower than it would have been had the seller not transferred her takings claim to him. The buyer will be willing to pay a bit more because he will be purchasing a potentially valuable lawsuit and not just the restricted property. When setting the price, the parties will consider not only the likelihood of receiving a permit and the diminution in value that a permit denial would cause, as they did above, but also the likelihood that a takings claim will succeed after the denial of a permit and the compensation that would result if that claim were to succeed. Even so, the use of this first alternative approach will require the parties to engage in considerably more guesswork than the use of the approach this Article advocates.¹⁷⁴

¹⁷³ Judge Wesley, dissenting in *Anello*, argued that unless a prior owner can transfer her claim to a potential buyer, "the property's value is destroyed by the transfer without the government having to pay compensation for it." *Anello*, 678 N.E.2d at 873 (Wesley, J., dissenting). His fear that some property owners may never be able to recover mirrors my fear that some owners will recover twice. The proposal that this Article recommends should address both of these concerns. *Cf. supra* note 129 (noting possibility that pre-enactment owner may recover compensation and that post-enactment buyer then may receive variance).

¹⁷⁴ One has to wonder whether most parties are capable of this level of precision and whether courts will consistently be able to apply this particularly difficult body of law to such a hypothetical array of factors. At least one court has engaged in an analysis of this type, in a thoughtful but highly complex opinion. *See Chase Manhattan Bank v. State of New York*, 479 N.Y.S.2d 983, 986 (N.Y. App. Div. 1984) (per curiam) (holding that just compensation for condemned property that already was subject to restrictive wetlands law must include "an increment for the reasonable probability of a successful judicial challenge to the [Tidal Wetlands] Act's application as confiscatory"). The court noted that if the landowner can show a "reasonable probability of . . . a rezoning or declaration of invalidity, the value of the property as zoned or restricted on the day of taking will be augmented by an increment, representing the premium a knowledgeable buyer would be willing to pay for a potential change to a more valuable use." *Id.* at 988 (citation omitted). The court awkwardly referred to this as the "reasonable probability—incremental increase rule." *Id.*; *see also* *Berwick v. State of New York*, 486 N.Y.S.2d 260 (N.Y. App. Div. 1985) (per curiam) (reaching like result on similar

Those who believe that the real estate market should operate in a way that allows parties to transfer risks among themselves freely might even prefer this first alternative to the approach that I recommended earlier, or might prefer a regime in which the parties may choose between the two alternatives. They will argue that different parties have different levels of expertise and different tolerances for risk and that all parties in the market should be allowed to transfer assets to those who value them most highly and risks to those willing to bear them. In the absence of other factors that make the transfer of an unripe takings claim problematic, I might be persuaded to favor this first alternative.¹⁷⁵ However, the exchange that this approach would require is not just the transfer of a business risk but also the transfer of a fact-based legal claim that still is developing. The ultimate success of this claim depends in part upon the state of mind of the person who acquired the property before the law changed and in part upon the workings of a permitting process that no one has yet pursued to completion. The buyer may decide to hold the land, along with the underripe claim that this alternative would transfer to him, rather than developing it immediately. By deferring the date on which any possible as-applied takings claim will ripen, this alternative fails to alleviate the problem of the regulatory takings claim that is slow to ripen and increases substantially the difficulties of proof and rebuttal that the buyer and the government might face later.¹⁷⁶

Once the claim does ripen, the success of the buyer's claim will depend in large part on his ability to show the court just what the seller's reasonable investment-backed expectations were. These are the expectations that the seller formed at the time she acquired the property and then transferred to the buyer

facts). *Cf. supra* note 75 (discussing similar "weighted average" approach to valuing land subject to use restrictions).

¹⁷⁵ *Cf. supra* Parts III.A-B (discussing similar option in context of facial and ripe as-applied claims).

¹⁷⁶ Contrast this type of "deferred denial-ripened regulatory takings claim" with an adverse possession claim that relies upon tacking by successive owners. *See supra* note 55 and accompanying text (discussing tacking doctrine). Under adverse possession law, an owner with a maturing claim can sell the land and the claim to a successor, who completes the claim by running out the clock. In that case, however, there is little question as to how much time remains. In contrast, there is no time limit on an as-applied regulatory takings claim if the owner has not yet sought a development permit and received a final decision. An owner may hold the undeveloped land indefinitely before deciding to apply. Therefore, transfer of an unripe as-applied takings claim, unlike transfer of an incomplete adverse possession claim, may create a situation in which the outcome of litigation depends on facts that occurred decades earlier. In addition, the problem is worse after a transfer than it would have been if the original owner simply had retained the property for many years, because once the property is sold, the original owner may be difficult to find and may be unwilling to cooperate when found.

after the law changed.¹⁷⁷ This will be an extremely difficult showing to make. Many years may have passed between the effective date of the regulation and the date of the final permit denial, and the law may have changed more than once along the way.¹⁷⁸ There may have been multiple intervening transfers of the property between those two dates, with the first post-enactment buyer selling the land and the claim to a second post-enactment buyer and that party then selling the land and the claim once again to a third person, who now is attempting to develop the property.¹⁷⁹ The seller, if she still can be found, may have little incentive to cooperate with her purchaser or with a remote owner who brings the claim; in some cases, sellers will be openly hostile to their buyers on the basis of other disputes arising out of the sale.

In addition, the "claim" that the seller would be transferring to the buyer is not really a claim at all. The typical as-applied takings claim asks whether a permit denial works a taking, a fact-specific question that cannot be answered until the owner applies for the permit and receives a final rejection. The development of this typical claim depends upon the actions of the owner and the government during a permitting process that may be protracted and that often involves detailed and individualized negotiations. What, then, would the seller be transferring to the buyer? The only stick in the seller's bundle that the buyer later may find useful is the previously-reasonable-but-now-unreasonable investment-backed expectation that she could build on her land without restriction. In other words, the seller is selling her ignorance of the future to the buyer, thereby requiring the court to pretend that the post-enactment buyer's investment-backed expectations are reasonable. The takings claim that would result artificially pairs

¹⁷⁷ The buyer's reasonable investment-backed expectations are irrelevant here, since those expectations cannot support a claim. *See supra* notes 74–79 and accompanying text (arguing that post-enactment buyer's expectations must factor in laws in effect at time of his acquisition of property). Only the seller's more expansive reasonable investment-backed expectations can support a claim by the buyer.

¹⁷⁸ Imagine that the law has changed several more times since the buyer acquired the property. If the buyer's permit application is denied, a court may be unable to determine just which change in the law led to the denial. The post-enactment buyer will be deemed to be on notice of only those changes that predated his acquisition of title, but in many cases, the denial will have been brought about by the combined effect of all changes in the law. How, then, can a court determine whether the buyer deserves compensation?

¹⁷⁹ Every time there is a change in the law followed by a transfer of property, the problem replicates itself. What is the status of the third owner after the third change in the law? To which of his predecessors' possible claims has he succeeded? How far back in the chain of title must the court look to find the "baseline" owner? If the court looks too far back, does it undercut the statute of limitations and make it impossible for the government defendant ever to rest assured that an ancient change will not be challenged as a taking? If the court does not look back far enough, does it run the risk of barring a takings claim unfairly?

the seller's reasonable pre-enactment investment-backed expectations with the post-enactment development plans of the buyer or his successor. The claim that Gazza would have acquired would rest on Notey's reasonable investment-backed expectations but would not ripen until Gazza's permit request is denied.

The convoluted argument that ensues from this pairing is that the buyer's property has been taken when the buyer is unable to develop land that he always knew might be impossible to develop, because when the *seller* bought the land she could not reasonably have anticipated that the buyer's future proposal—unimagined by her at the time she acquired the land—would be rejected. Under many circumstances, it may be desirable to adopt a rule such as this one that encourages the free market transferability of assets and risks, but the problems with this first alternative approach combine to make it unworkable. The amount of guesswork as to pricing that this approach requires, the extent to which it relies upon the expectations of a former owner who may be unavailable or uncooperative, the possibility of intervening changes in the law and in the ownership of the property, and the fact that the claim that will be transferred is not yet a full-fledged legal claim all suggest that this option should be avoided.¹⁸⁰ This is particularly true when the more functional option that this Article supports can resolve all constitutional disputes more promptly.¹⁸¹

A second alternative solution to the problem would be to allow the seller to retain her unripe takings claim but to determine that it does not ripen until the buyer or his successor actually applies for a permit and finally is denied.¹⁸² If the buyer receives his permit then he may build, but if he does not then the seller may bring a takings claim based on this denial. Under this variation, Notey's claim would have ripened when Gazza's permit application was denied.¹⁸³

¹⁸⁰ In all fairness, some of these problems can arise even if the original owner retains the property without developing it. But any solution that begins with a troubled area of the law and then compounds those troubles still further should be avoided if a better alternative is available.

¹⁸¹ The proposal that this Article recommends has the additional advantage of causing claims to ripen sooner. *See supra* notes 117–18 and accompanying text. By using a post-enactment sale of the property as a triggering event—one that causes the seller's claim to ripen immediately instead of waiting for someone to apply for a permit—this proposal ensures that some parcels of property will either test the limits of the law or forever be barred from doing so within a shorter period of time. This proposal, coupled with the statute of limitations, will advance the date on which the government's exposure to liability ends. It also will allow owners and potential buyers to place a firmer value on property sooner, with the uncertainties of a potential takings claim disappearing once the holder of a ripe claim either brings that claim or allows it to expire.

¹⁸² Once again, the claim in question is a denial-ripened regulatory takings claim rather than the sale-ripened claim that this Article's proposal would allow. *Cf. supra* note 171; *infra* note 189 (discussing two other alternatives).

¹⁸³ While this alternative, like the option that this Article supports, leaves any takings

The practical problems with this approach are fairly obvious. The success of the claim that the seller may be able to assert down the road depends upon the intervening actions of the buyer, even though their interests are opposed and the seller probably has little control over her buyer's behavior.¹⁸⁴ Once the sale closes, the buyer, who can argue for a permit but not for takings compensation, benefits only by receiving a permit, while the seller, who has no need for a permit but may receive takings compensation, gains only if the permit is denied.¹⁸⁵

There are other problems. This second alternative does little to address the causes of the long delays that are so common in takings cases.¹⁸⁶ The buyer may sell the property to a remote buyer, which means that the seller's claim must survive two or more transfers, waiting indefinitely for a stranger to pursue a permit application to completion. At the same time, the law will become more or less restrictive every time the government decides to change it.¹⁸⁷ An individual seller might die or a business entity seller might dissolve, making it more difficult to reconstruct this party's expectations when their successor later brings a claim.¹⁸⁸ In the end, a remote successor of the seller might bring a claim many

claim in the seller's hands, it also postpones the moment at which the claim ripens until the time when the buyer's permit application is denied. Thus, the claim is deferred and may never arise at all, but if it does arise, it will be a claim for a larger amount because the denial now is certain. *Cf. supra* note 122 (noting that drop in property's value under conditions of uncertainty is smaller than drop in property's value if denial is certain).

¹⁸⁴ The contract of sale could be drafted to require some level of cooperation between the parties, but their interests become completely divergent once the seller delivers the deed.

¹⁸⁵ In the end, the seller can profit only by showing how her original expectations have been impaired by the forceful impact of the new law on someone else's land. The buyer, meanwhile, will attempt to convince the permitting authorities that the law's goals are relatively modest and that the law can be varied for him without impairing its overall regulatory effect.

¹⁸⁶ Even when the original owner retains title to the property, there is the possibility that a claim may not ripen for an extended period. Under this second alternative, however, the seller relinquishes her ability to hasten the day when her own claim will ripen. On the other hand, the fact that the property has changed hands may mean that the new owner plans to develop the property that the original owner had been holding vacant for investment purposes.

¹⁸⁷ As a result, there may be several changes in title punctuated by intervening changes in the law, eventually followed by a permit denial. By then, it may be impossible to figure out just which of the changes in the law actually led to the denial—in fact, the denial often will have been caused by some amalgamation of these laws. *See supra* notes 178–79; *infra* note 191 (discussing this problem in other contexts).

Meanwhile, every time the then-current owner of the property decides to sell it, that seller retains an unripe claim that is grounded upon the reasonable investment-backed expectations that he formed against the background of the law in force when he acquired his title.

¹⁸⁸ While this, too, is a risk under any of the possible rules, the fact that a claim may

years after the original sale, on the basis of the denial of a permit to a remote grantee of the buyer by a government entity that has expanded and contracted the law several times. Courts would be wise to avoid hearing claims of this type.

The third alternative approach turns out to be the most attractive of the three options that are discussed in this Section. The reason for this, upon closer scrutiny, is that this third approach is nothing more than a restatement of the approach that this Article has recommended with one modification. This third alternative begins by following this Article's preferred approach, allowing the original owner to bring a sale-ripened takings claim based upon the reduction in the purchase price that the new law causes. Under this third alternative, however, the original owner concurrently transfers this ripe takings claim to the buyer, with a concomitant increase in the sale price. The buyer purchases both the land in its restricted condition and the sale-ripened takings claim that this Article's preferred approach would have let the seller bring.¹⁸⁹

This third alternative differs little from the method of analysis that this Article supports, and the two share many of the same advantages. This alternative also presents some disadvantages, however. Most significantly, the difficulties of proof noted above recur here, because this claim would pair the current owner's permit application with the prior owner's expectations.¹⁹⁰ The success of the buyer's sale-ripened claim will turn upon the expectations of his seller, who may be difficult to locate and may have little incentive to participate. These problems will be exacerbated if the seller dies or dissolves, the buyer transfers the property (and, presumably, the ripe claim) to a third party, or the government entity modifies the law again.¹⁹¹ Courts are likely to prefer a rule that leaves this sale-ripened claim in the hands of the original owner while some

remain unripe for so long under this second alternative means that there is a greater likelihood that the original holder of the claim will be unavailable when it does ripen. The expectations that this unavailable person formed at the time of their original purchase will be critical to the outcome of the case.

¹⁸⁹ The claim that is assigned under this alternative is a sale-ripened claim and not a denial-ripened claim. *Cf. supra* notes 171, 182 (discussing two other alternatives).

¹⁹⁰ For a more detailed discussion of these difficulties of proof, see *supra* notes 177–81, 184–88. The federal Assignment of Claims Act generally would preclude the use of this alternative in claims against the United States, in part for some of the reasons described here in the text. See *supra* note 62.

¹⁹¹ Each time the property is transferred, the court must figure out which prior owner's expectations flow through to the new owner. When the new purchaser acquired title, was he succeeding only to the expectations of his immediate seller or to those of a remote seller that have been passed along through each link of the title chain? The possibility of intervening changes in the law complicates this analysis still further. See *supra* notes 178–79, 187 (discussing this problem in other contexts). The fact that the statute of limitations already will have begun to run will reduce these concerns but will not eliminate them.

buyers and sellers may prefer to have the claim migrate to the buyer along with the property. Perhaps courts will compromise by allowing the parties to make this decision for themselves in each case.¹⁹²

G. Unripe As-Applied Claims: Unusual Cases

It might be appropriate to modify the approach advocated above in certain cases in which the transfer is at less than arm's length, such as transfers at death, transfers in connection with a marriage or divorce, transfers that result from a change in business form, or post-enactment foreclosure of a pre-enactment mortgage. Each of these situations presents an unusual case in which the original owner and her successor do not negotiate the terms of the transfer in the ordinary way, which means that the reasons for recognizing sale-ripened claims in most other contexts may not apply.¹⁹³ In the case of transfers at death, there ordinarily is no negotiation or sale, but rather a succession by will or by operation of law.¹⁹⁴ The estate, and then the successor, simply should assume all of the rights of the decedent.¹⁹⁵ In other words, for purposes of this analysis, the death is not treated as a title transfer, and the successor steps into the shoes of the decedent.¹⁹⁶

¹⁹² See *supra* notes 57, 60, 72 (discussing fact that New York Court of Appeals was aware of this possibility). If a court were to decide that an affirmative agreement is necessary to transfer this sale-ripened claim to the buyer and that such an agreement had not been executed, the seller presumably would retain the takings claim.

¹⁹³ See, e.g., *Anello v. Zoning Bd. of Appeals*, 678 N.E.2d 870, 873 (N.Y. 1997) (Wesley, J., dissenting) (noting "interesting alchemy" of New York court's rule on estate of decedent).

¹⁹⁴ See *id.* (Wesley, J., dissenting) (expressing concern about "[the] decedent who, through infirmity or other reason, could not challenge a confiscatory regulation prior to the decedent's death").

This exception should not apply to inter vivos gifts, in which the donor and donee are in a position to negotiate the terms of the transfer. See, e.g., *Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 717 (S.C. 1999) (rejecting claim by plaintiff who acquired property by gift 11 years after land use restriction became effective). In other words, for purposes of this Article's analysis, a gift is more like a sale than it is like a devise.

¹⁹⁵ If David Lucas had had the misfortune to die while his claim was being litigated, I seriously doubt that South Carolina would have argued that his estate had lost its claim because its investment-backed expectations were less expansive than Lucas's were.

¹⁹⁶ Any approach that treated transfers at death in the same manner as voluntary transfers, while technically feasible, would be highly undesirable. The first transfer, from the decedent to the estate, already will have occurred at the moment of death. Transfers at death often are unexpected, and it would be unfair to demand that all property owners test new land use regulations promptly merely because they know that they might die without warning. The second transfer, from the estate to the recipient under the will or in intestacy, should be allowed

The same justification applies to transfers that arise as part of a marital settlement, such as transfers of entireties property to one spouse or transfers of property from one spouse to the other. Although owners can time the transfer of property to a greater extent when they divorce than they can when they die, they often will not have the luxury of time that applications for a permit require, and the negotiations that result are likely to be quite different from those that arise in transactions that are purely commercial. Similarly, transfers that result from a marriage, such as a transfer from one spouse to both as tenants by the entireties, usually are not timed and negotiated in the way that commercial transactions are; moreover, property law has a long tradition of rejecting rules that discourage marriage.¹⁹⁷ The transfer of property incident to the termination or creation of a marriage thus should not be treated as a title transfer for purposes of this Article's analysis. The successor simply should assume the rights of the predecessor.

In the case of certain changes in corporate form, the transfer often is a transfer in name only and may not involve any beneficial change in ownership.¹⁹⁸ For purposes of the analysis discussed here, these changes should not be treated as changes in ownership, and the prior entity's knowledge and expectations should be imputed to its successor.¹⁹⁹ Finally, if a mortgagee that

to proceed quickly. A requirement that the executor or administrator bring the takings claim would slow the probate process and would impose a substantial burden on those overseeing estates.

¹⁹⁷ See, e.g., RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 6.1 to 6.3 (1983) (stating that restraints against marriage or remarriage should be strictly construed); *id.* § 7.1 (stating that restraints encouraging separation or divorce should be strictly construed).

¹⁹⁸ This will depend on the type of transaction in question. In an example most relevant to the commercial real estate market, a limited partnership that re-forms as a limited liability entity probably ought to be able to transfer its reasonable investment-backed expectations to that new entity. Some mergers, takeovers, and liquidations also might merit special treatment.

States and their subdivisions sometimes recognize that not all transfers are identical. For example, a jurisdiction might not impose a transfer tax on a deed incident to a change in business form. See, e.g., NEW YORK, N.Y., ADMIN. CODE § 11-2106(b)(8) (1996) (exempting deeds effecting changes in identity or form of ownership from payment of real property transfer tax).

¹⁹⁹ Of course, if the change in the form of the entity has some substance to it, then it should be treated as a true transfer. The Appellate Division of the Supreme Court of New York properly reached this conclusion in a post-*Gazza* case that involved property just up the street from *Gazza's* and almost identical legal issues. That court rejected petitioner's contention "that the corporation was merely his alter ego and that he therefore should be considered the true owner of the property since 1958." *Brotherton v. Department of Env'tl. Conservation*, 675 N.Y.S.2d 121, 122 (N.Y. App. Div. 1998). "[H]e received the benefits of corporate ownership for many years and previously succeeded in preventing the DEC from obtaining disclosure on the issue of his involvement in the corporation, [and] he may not now disregard the corporate

received a mortgage prior to the change in law is forced to foreclose after the law changes, then the foreclosure sale purchaser should be allowed to succeed to the mortgagor's rights.²⁰⁰ Neither the mortgagor, which is likely to be severely distressed, nor the mortgagee, which is unlikely to be an entity that routinely pursues building permit applications, should be forced to bring or lose a claim under these circumstances. A rule that protects foreclosure sale purchasers will encourage mortgage lending, with lenders more willing to lend if they know that those who bid at foreclosure can step into the mortgagor's shoes, while a contrary rule might lead to marginally higher interest rates.²⁰¹ This last point obviously is subject to much debate and raises many of the same issues that Congress considered when it recently expanded the security interest exception to CERCLA.²⁰²

IV. CONCLUSION

The New York Court of Appeals properly decided that it would offer no relief to the landowner who is forced to comply with restrictions that existed when he bought his property. The buyer's reasonable investment-backed expectations could not have been impaired under these circumstances. If the buyer did not account for the effects of the restriction when he bought the property, then his expectations are unreasonable; if he did factor in these effects, then he cannot claim that any impairment of his expectations is backed by his investment.

form of ownership merely because it no longer serves his interests." *Id.*; see also *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 418 (Va. 1998) (rejecting argument that corporation's lack of knowledge should be imputed to shareholders that succeeded to its ownership of property because "where persons have deliberately adopted the corporate form to secure its advantages, they will not be allowed to disregard the existence of the corporate entity when it is to their benefit to do so") (quoting *Bogese, Inc. v. State Highway & Transp. Comm'r*, 462 S.E.2d 345, 347 (Va. 1995) (quoting *Board of Transp. v. Martin*, 249 S.E.2d 390, 396 (N.C. 1978))).

²⁰⁰ This result could be accomplished most easily by recognizing that the mortgagee's rights, including the right to foreclose, attach on the date of the mortgage and not on the date of the foreclosure. These rights then would have to be transferred to foreclosure sale purchasers other than the mortgagee.

²⁰¹ *Cf. Borough of Belmar v. 201 16th Ave.*, 707 A.2d 1106 (N.J. Super. Ct. Law Div. 1997) (holding that mortgagee is allowed to continue its mortgagor's prior nonconforming use only if mortgage specifically includes language conveying nonconforming use and mortgagor does not abandon that use).

²⁰² See Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601(20)(E) (1994 & Supp. II 1996) (defining "owner or operator" of vessel or facility in way that does not include foreclosing lenders and those who purchase from them under certain circumstances).

The court had no need to address the concerns of the pre-enactment owner who sold the land to this purchaser. The approach that I have proposed in this Article, which expands upon the analysis that the court offered, fills this gap in takings law. This approach is internally consistent, it comports with existing law, and it will lead to few negative secondary effects and none of constitutional import. In the vast majority of cases, there is no taking at the outset, and there is unlikely ever to be a taking no matter how the parties act. Nonetheless, if the pre-enactment owner believes that there may have been a taking, this analysis offers her several reasonable options for testing her hypothesis. She may retain the property and seek a permit herself. She may sell the property and accept the sale-ripened takings claim that this Article's analysis would give her. Or she may structure her conveyance in any of a number of ways that allow her to retain her ownership interest and any denial-ripened claim that may arise in the future.²⁰³

If the pre-enactment owner believes that her claim is meritorious, she may preserve her constitutional argument under this analysis whether she chooses to sell the property or to retain it. Exercise of some of the options that this analysis provides may inconvenience this owner and may limit her flexibility, but that often will be true after the use of land is restricted. On the other hand, some of the options that become available to her under this approach may prove to be less burdensome than the process of applying for a permit and ripening a claim that current takings law demands. Moreover, given the many ways in which the landowner can preserve her claim in its original form or in a modified form, and given the many uncertainties in substantive takings law, there is little likelihood that a government considering changing its rules will manipulate the law in a way designed to extinguish claims that otherwise would be valid.

The New York court had little occasion to address substantive takings law, and the approach that I advocate in this Article is not intended to redefine what a taking is.²⁰⁴ The pre-enactment owner retains the right to bring a takings claim whether she keeps her property or sells it; the post-enactment buyer cannot bring a takings claim; and the government wins or loses based solely on the merits of the claim and not on the identity of the claimant. In the end, the net effect of this proposal on takings law should prove to be a neutral one.

The analysis offered here should not lead to increases or decreases in the total amount of takings compensation that courts award, but it will provide greater flexibility to all actors in the real estate market. Owners and prospective buyers will be able to sell and buy property while its permitted uses still are in

²⁰³ See *supra* notes 130–37 and accompanying text (discussing these alternative structures).

²⁰⁴ Recall that the New York Court of Appeals barely discussed substantive takings law in its four opinions. See *supra* notes 1–12 and accompanying text (discussing *Gazza*); notes 13–32 and accompanying text (discussing *Anello*, *Basile*, and *Kim*).

question and to factor these uncertainties into the price. Sellers will be permitted to bring a modified type of takings claim that ripens somewhat earlier. The property market will be able to operate freely and without any change in overall takings compensation while the law remains unsettled. Takings law undoubtedly would benefit from further clarification and greater predictability. Until that happens, the proposal that I recommend above will allow the property market to function with less friction and will treat buyers, sellers, and the government fairly.

